

**OVERCOMING BARRIERS TO IVHS-  
LESSONS FROM OTHER TECHNOLOGIES**

**FINAL TASK F REPORT**

**MODEL ADVANCED TRAFFIC MANAGEMENT SYSTEM FRANCHISE AGREEMENT**

**Prepared for the Federal Highway Administration**

**by The Urban Institute  
with  
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MTA/EMCI**

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## INTRODUCTORY NOTES

***Viable Advanced Traffic Management Systems will be central to the development of ITS technologies, and critical to the delivery of many private sector ITS services to the public. By its very nature, however, ATMS relies heavily on access to the public rights-of-way. Consequently, development of ATMS will require a high degree of coordination between the public and private sectors. This model franchise agreement is an attempt to describe the relationship between the public and the private sector needed to achieve that level of coordination.***

***The franchise model presented here is just one of several ways in which the relationship between the public and private sectors could be defined. Other options might provide for less exclusivity and freer entry into the market by the private sectors, but the heavy reliance of ATMS on the use of public rights-of-way raises questions about the viability of such models. This model assumes that the information-gathering features of an ATMS system, in particular, will require the intensive use of the rights-of-way and the investment of substantial capital in the rights-of-way. Therefore, it seems unlikely that competing ATMS systems could be successfully built in many areas.***

***In practice, of course, the needs of government and private industry will vary depending on a range of circumstances. It is also difficult to predict at the outset what services will actually be in demand, or how profitable a given service might be. Thus, no single model will j2 all the possible situations that may arise in the development and deployment of ITS. Consequently, this model agreement does not present a single one-size-fits-all option, but offers a variety of modules; options and model clauses that can be combined as needed to satisfy the different needs of different situations.***

***On the other hand, this model agreement does not attempt to define all of the possible different relationships between government and industry, nor does it attempt to address many of the details that will be required by specific agreements. A model that attempted to cover such a broad range and level of detail would probably prove too cumbersome to be of use, and would certainly not address all the issues that will actually arise. Nevertheless, the model does attempt to address the more likely structures and the critical issues in sufficient detail to serve as a starting point for any potential transaction.***

***It should also be noted that the model is only one element of what could be a very long and complicated process. The model is only useful if any necessary authorizing legislation has been adopted, and a Request for Proposals or other form of solicitation has been issued. The model could be attached to such a solicitation, or introduced during negotiation with the winning bidder. In any case, the model outlines the operational relationship between the public and private sectors, but it does not by any means dispose of all procedural questions.***

***This Note addresses the principal factors that give rise to the variants made possible by the model. Those factors are:***

- ***The identity of the franchiser;***
- ***The compensation mechanism, which in turn depends on the profitability of a particular project;***
- ***Which entity will be responsible for designing, building, operating and maintaining the system;***
- ***The range of ITS services to be provided by the franchisee;***
- ***Whether the franchise is to be exclusive or nonexclusive; and***
- ***Whether the system is to include the capability for electronic toll collection.***

***This Note also discusses the importance of the “bankability” of a project and describes some of the financing mechanisms that might be available.***

***Finally, this Note makes some observations about the development of design and construction standards, and raises the need in many jurisdictions for authorizing legislation and corresponding models.***

### ***The Identity of the Franchiser***

***For an ATMS system to be effective, it must have access to and provide information over an entire metropolitan area. This means that a multi-jurisdictional authority is required to oversee the system and coordinate among the member jurisdictions and with other regional authorities. In most states, however, the public rights-of-way are owned and controlled by a patchwork of local governments. This raises many state constitutional and local law issues that must be resolved state-by-state and region-by-region.***

***For example, may a local government cede its franchising authority to a regional transportation authority or other multijurisdictional body? If so, that authority may grant a franchise to an ATMS developer; this model assumes that is the case. Still, state constitutional and statutory amendments, or municipal charter amendments, may be required to make this possible. If those amendments are not practical, a more complicated structure will be required. In that case, this model can be readily adapted to serve as a franchise agreement between a municipality and the private sector ATMS provider and additional documentation will be required to establish the relationship between the franchising authority and the regional authority.***

**Another question that may arise concerns a regional authority's power over related matters, such as zoning regulations, and its general authority to regulate matters affecting the system. Again, the draft assumes the authority will have broad police powers, but this may not be the case.**

**In short, there are a great many issues that will have to be resolved on a case-by-case basis, and that cannot be fully addressed in a model such as this. The principal value of a model in this regard is that it raises relevant issues, so that they may be dealt with appropriately as the occasion arises.**

### **The Appropriate Compensation Mechanism**

**This model agreement assumes that there are five general approaches to defining the relationship between an ATMS provider and a municipality, depending on the extent of government financing required and the degree to which the project is expected to be profitable. Each of the resulting structures is referred to as a module. This model agreement contains alternative language in Sections 3 (Compensation and Revenues), 5 (Operations and Maintenance) and 6 (System Facilities, Equipment, and Services) regarding certain key provisions that distinguish the modules from each other. For example, if development of ATMS in a particular franchise area is expected to be a public good, or if policy considerations dictate that it be treated as a purely public good, then those provisions corresponding to Module A (defined below) should be selected. Conversely, if projections indicate that an ATMS system could be profitably built and operated by the private sector, then the provisions corresponding to Module E should be incorporated into the agreement between the franchiser and franchisee.**

**The five modules are defined as follows:**

#### **MODULE A -- PURE PUBLIC GOOD:**

**This module starts with the assumption that provision of ATMS and related data is a pure public good. Therefore, the system is expected to generate little or no revenue and must be funded by the public sector. The franchisee is required to deliver the system's services at no charge, and is compensated by the government for its services. Because there is no private sector funding involved; this module is as much like a government contract as it is like a franchise. Finally, no revenue sharing or other compensation mechanism is needed because there will be no project revenues to be shared.**

***There are two service options possible under this module; these are discussed below.***

**MODULE B -- PARTIAL PUBLIC GOOD:**

***This module anticipates that the costs of maintaining and operating the system can be met with revenue generated by selling services to the public, but that revenues are not sufficient to assure the franchisee a profit, or to finance construction of the system. Like Module A, this module contains many elements of a government contract: the government finances design and construction and pays the franchisee a management fee for operating the system. To reduce the public sector's cash expenditures, the franchisee is allowed to retain any project revenues as part of its compensation.***

**MODULE C -- PROJECT BREAKS EVEN:**

***This module assumes that revenues are sufficient to offset all costs, including design and construction, but not sufficient to make the project profitable. Therefore, the franchisee will bear all costs and retain the revenues but the city guarantees the franchisee a reasonable rate of return, to be made up with public funds as required. An alternative would be for the public sector to assist in financing construction. Depending on the economics of the project, this might reduce the franchisee's costs and produce the desired rate of return without supplemental government payments. This alternative is not directly addressed in the model because the document is concerned with the operational issues between the parties. Financing of the project – as further discussed below -- is beyond the scope of this model agreement.***

**MODULE D -- OPERATIONS PROFITABLE:**

***This module assumes that operating revenues are sufficient to cover operating***

**costs, including profit, but that the public sector must bear the cost of design and construction. The government receives a token franchise fee (as in all the modules) in recognition of its right to compensation for use of the rights-of-way, and additional compensation out of operation revenues to delay its contribution towards the costs of construction and more accurately assess the value of the rights-of-way to the franchisee.**

**MODULE E -- PROJECT PROFITABLE:**

**This module assumes that the entire project can be profitably built and operated by the private sector, and provides for compensation to the city for use of the rights-of-way in the form of a franchise fee and the provision of facilities and equipment. The public sector could assist in financing the project, as in Module C, but this module assumes such assistance is unnecessary. It might be desirable, however, to compensate the franchiser through some means other than a franchise fee on gross revenues, and several options are presented, as in Module D.**

**Additional Compensation Options:**

**Modules D and E include four compensation options intended to divide revenues from the operations of the system between the franchiser and the franchisee. The compensation options do not apply to the first three modules because there are no excess revenues to be divided. In Modules A and B the project is entirely or largely financed by the public sector as a public service, with the understanding that there will be no direct return on that investment. In Module C, the private sector provides all or most of the financing and the project breaks even but the public sector may need to contribute additional funds to ensure there is a profit. Only in Modules D and E is there a possibility of sharing in revenues. The Compensation Options are:**

**COMPENSATION OPTION I -- FLAT FEE:**

***Under this option, the franchiser will receive a flat monthly fee intended to compensate the franchiser for the use of the public rights-of-way and defray some or all of its costs. The amount of the fee would have to be negotiated.***

**COMPENSATION OPTION II -- FACILITY FEE:**

***Under this option, the franchisor receives a fee based on the number of units of equipment installed by the franchisee in the public rights-of-way. Again, the fee for each type of equipment would have to be negotiated.***

**COMPENSATION OPTION III -- SHARE OF NET PROFITS:**

***Under this option, the franchisee would receive a share of the net profits of the system. The model provides for the franchiser to receive 50% of the net profits, but that would, once again, be subject to negotiation.***

**COMPENSATION OPTION IV -- SHARE OF GROSS REVENUES:**

***Under this option, the franchisor receives a share of gross revenues from the operation of the system. The model uses 5%, but this, too, will vary from one case to another.***

***The above options are not exclusive and are provided only as examples. In fact, in any actual case this issue is likely to be heavily negotiated and may result in very complicated formulas being applied. For example, in Module D it may be desirable to reduce payments to the government after it has recovered its investment. Conversely, in Module E it may be desirable to increase those payments after the franchisee has recovered its investment. There are many possible permutations.***

**The Choice of Entity To Perform a Function**

***The primary steps in developing an ATMS system are design, construction, operation and maintenance. An examination of the provisions corresponding to the modules defined in the preceding section reveals that the model assumes that all functions will be performed by the private sector. In theory, many permutations are possible; for***

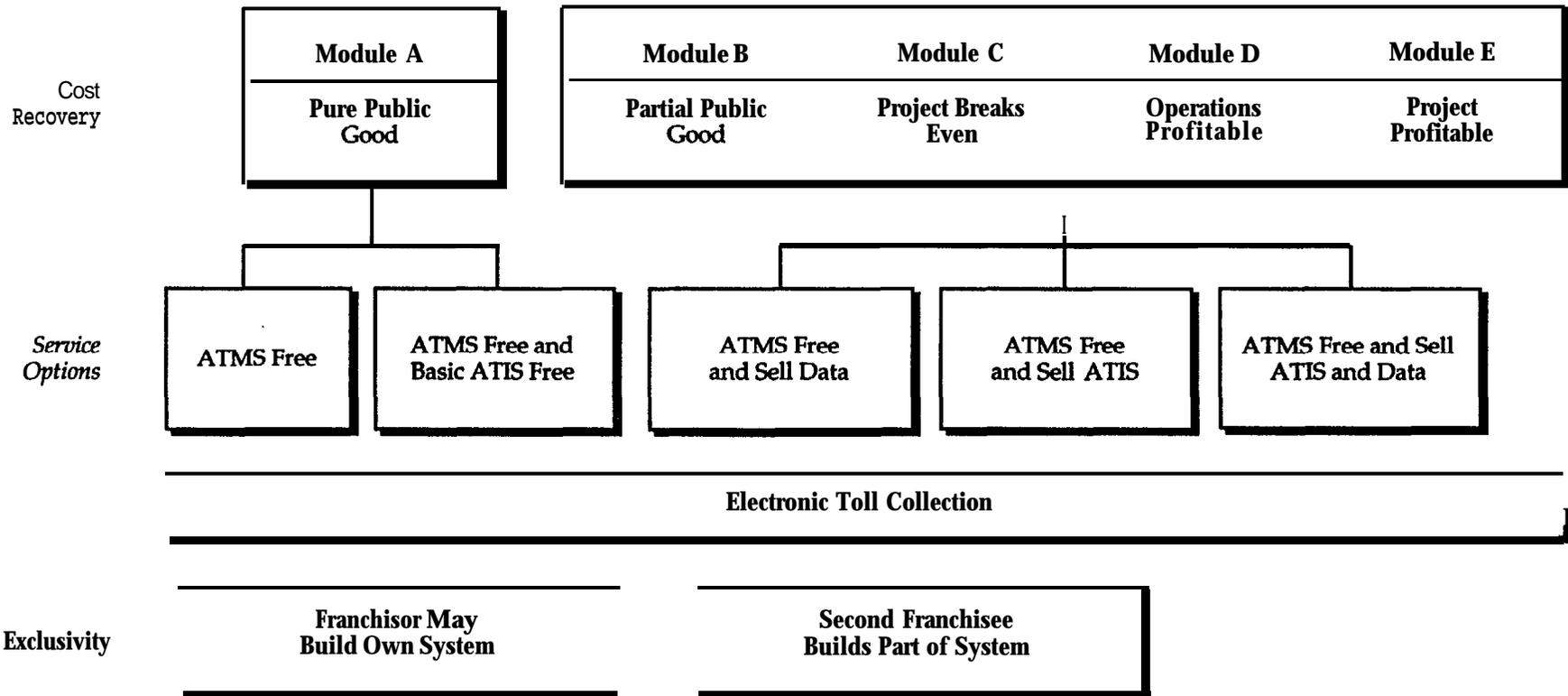
**example, one entity might design a system, another might build it, and a third might operate and maintain it. In practice, however, we believe that a single entity is likely to be responsible for all those functions, with the principal variable being how each element will be financed. Another likely possibility, however, is that state or regional transportation authorities will be responsible for system design, and that the private sector will carry out the remaining steps in developing and running a system. Such an option would require a relatively simple change to the language in the modules, so rather than clutter the draft with a separate submodule, we have noted the option in footnotes at appropriate places.**

### **Range of Service Options**

**Another dimension that must be addressed by any agreement is the range of services to be provided by a particular franchisee. This model agreement sets forth five Service Options in Section 6. Service Options I and II apply only to Module A, the Pure Public Good scenario described above. Service Options III, IV and V might each apply to each of the four remaining modules. The relationships of the Service Options to the modules appear in Figure 1.**

- SERVICE OPTION I -- ATMS FREE:** **This option provides that the franchisee will deliver ATMS services and traffic data generated by the system at no charge, and will not provide Advanced Traveler Information System (“ATIS”) services.**
- SERVICE OPTION II -- BASIC ATIS:** **Under this option, the franchisee will provide ATMS and traffic data, and will also provide basic ATIS services at no charge.**
- SERVICE OPTION III -- ATMS PLUS DATA:** **This option is the same as Service Option I, except that the franchisee may sell data generated by the system, either to the public in general or to value added resellers.**
- SERVICE OPTION IV -- SALE OF ATIS:** **This option is the same as Service Option II, except that ATIS services will not be bundled with ATMS as a public good, but will be sold to the public.**
- SERVICE OPTION V -- ATIS AND DATA:** **Under this option, the franchisee will provide ATMS, may sell ATIS services (as in Service Option IV), and may sell data**

**Figure 1. ATMS Modular Franchise Agreement**



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**generated by the system (as in Service option III).**

### **Provision of Additional Services**

***This model agreement also provides for what is essentially a sixth service option, namely the provision of additional services that might be possible as a result of construction of ATMS. Rather than establish a separate service option, however, Section d(c) of each module simply provides that the franchisee may provide such other services if the franchiser agrees and the parties agree on terms. Since it is unclear what the additional services might be, and no services may actually be provided without subsequent agreement, it seems unnecessary and more flexible to establish a separate option for this possibility. Note that this provision effectively allows the parties to expand the range of service options by entering into a separate agreement, but without requiring the grant of an additional franchise.***

***There are two types of additional services: “other ITS Services” and “Ancillary Services.” Other ITS Services are services within the conception of ITS that are made possible by the construction of the system but that the agreement at its inception does not contemplate will be provided by the system. Ancillary Services are services that do not use the system or, if they do use some of the facilities of the system, fall outside the concept of ITS services. Examples of ancillary services use the right to operate restaurants, rest areas, or other concessions in the rights-of-way, installation of fiber optic lines for non-ITS purposes, or the use of fiber installed as part of the system for other purposes, such as leasing of excess capacity to third parties.***

***Finally, as noted above, the model generally assumes that ATIS services will be provided by the ATMS provider either because those services are not profitable on their own, or their revenue is needed to ensure overall profitability to the ATMS system. It may be, however, that independent ATIS providers will be viable. Accordingly, this model is accompanied by a Model ATIS Franchise that would apply if the independent provision of ATIS proves feasible and desirable.***

### **The Exclusivity of the Franchise**

***The model assumes that any ATMS franchise will be exclusive, simply because at this point it appears unlikely that a viable competitive market for ATMS services can be developed. Nevertheless, it may be desirable for the franchisor to be able to install parallel facilities in those cases in which redundancy and reliability demand it. Examples of this would be back-up control centers and surveillance equipment. For this reason, the model specifically provides that the franchiser may build its own system if it chooses.***

***On the other hand, it might be economically feasible for a second provider to install a parallel system -- or part of a system -- in some cases. The model notes the provisions that would have to be modified in that case, although it does not address the kind of detailed coordination requirements that would be needed or the financial ramifications of such a system.***

***Finally, it should be noted that a particular franchise need not apply to the entire territory under the franchiser's control, although the model assumes that would be the case.***

### **Electronic Toll Collection**

***The model anticipates that Electronic Toll Collection will not be a part of the system, but certain provisions that should be revised or added if it is to be included.***

### **Financing Options**

***Although arranging financing for design and construction is a critical step in the development of an ATMS system, the model franchise does not address that issue directly, and there is no section of the document devoted to financing of the project. Modules A through E and Compensation Options I through IV touch on the question of financing and illustrate that how the project will be financed will vary greatly depending on the profitability of the project and other factors, but they do not discuss how financing would be obtained. Such issues are largely outside the scope of the document, which addresses the operational relationship between the parties. Nevertheless, the issue is central to the development of ATMS, so this note will provide some additional background on financing mechanisms.***

***Financing could be obtained through a number of sources, using a variety of mechanisms. The public sector has different options than the private sector, and any given project will require its own peculiar combination of sources and mechanisms. For example, under Module A, essentially all the financing for the development of the system would come from the public sector. The private sector partner would have to have sufficient funds to conduct its operations on a day-to-day basis, but practically all of its funding for the construction, design and operation of the system would come from the franchiser. The franchisor could raise the necessary funds either through general tax revenues, by levying a special tax, by issuing general obligation bonds backed by the government's general taxing authority, or by issuing revenue bonds backed by revenues from the project. Which of these options is available depends on a number of factors, such as whether the project is deemed to be for a public purpose, whether the borrower requires***

**the specific authority to borrow money for such a purpose, and if so, whether it has that authority.**

**There might also be federal funding available for part of the project. If the franchisor is a local government agency, there might be state funding available, derived either from tax revenues or bond financing.**

**At the other extreme, under Module E, the public sector would probably make no contribution to the project. The private sector partner could finance the project by seeking equity contributions from investors, using cash reserves, borrowing money in the private capital markets, or forming a joint venture to share the expense with other private entities. As a practical matter, such a project would be financed through a combination of means, but would likely depend heavily on the issuance of debt instruments.**

**Any combination of these mechanisms could be used to finance the modules that anticipate a combination of private and public funding. For example, Modules C and D note that the public sector's lower cost of borrowing would help reduce costs for the private sector. If the franchisor were to issue bonds dedicated to the project with the understanding that the franchisee would make payments to the franchiser to allow the franchiser to repay the debt, the reduced costs might make an otherwise marginal project profitable.**

**Financing is critical for the obvious reason that without adequate funds no project can be built. Before the specific financing mechanism for a project can be established, however, a more fundamental question must be addressed. That question is whether the project is "bankable," or structured in a way that it will attract private capital. If a project is not bankable, the private sector partner will not willingly invest its own funds, and will have trouble attracting debt financing. In addition, the public sector, which will almost certainly issue some amount of debt, will be unable to market its bonds. Therefore, in addition to the availability of the basic financing methods discussed above, some additional analysis is required.**

**The four factors that will determine the bankability of a project are: the latitude allowed under the authorizing legislation; the degree of agency financing or guarantees; revenues; and the degree of exclusivity.**

**If the authorizing legislation defines the scope of a project very narrowly and limits the public sector's freedom to consider alternative organizational structures and revenue sources, the project will be relatively less attractive. The model does not address that issue directly, although this Note does stress the importance of obtaining favorable authorizing legislation.**

**Likewise, if the public sector is committed to financing the project or guaranteeing private financing, the financial risk of the project to the private sector will clearly decrease,**

**and the project will again be attractive. One mechanism that can improve the bankability of a project is the establishment of revolving funds, in which the public sector issues bonds to establish a financing pool upon which the franchisee can draw for certain purposes, provided that revenue from the project is used to replenish the fund. Another alternative would be government guarantees of loans to the franchisee, again with the goal of reducing the franchisee's borrowing costs.**

**The effect of a reliable revenue stream from the project is obvious; this model provides alternative structures based on the strength of the revenue stream projected for a particular project.**

**Finally, the degree of exclusivity is important because the presence of competition tends to reduce revenue and increase the risk of failure. As discussed above, this model presumes exclusivity, although it notes that it might not be desirable in all cases.**

### **Design and Construction Standards**

**The model addresses the question of design and construction standards in fairly general terms, leaving the franchiser the authority to establish separate standards by regulation, and anticipating that substantial additional detail will be provided in the Construction Plan and Operations Plan developed in the context of specific projects.**

### **Need for Legislation**

**Although the concept of local franchising is well-established, states generally limit the purposes for which a franchise may be granted. In addition, many states restrict the ability of government entities to enter into other kinds of arrangements that may be desirable for the successful implementation of ITS. In particular, ATMS may prove most effective implemented by a joint powers authority in conjunction with the private sector. Thus, entities examining the possibility of adopting some version of this model must first examine their state laws and municipal charters, and then consider what changes may be required to authorize the particular type of public-private partnership being considered. Among other changes that might be required are the implementation of some of the financing mechanisms discussed earlier, and perhaps the modification of state open records law requirements to accommodate the private sector's need to maintain the confidentiality of certain information. Thus, there may be a further need for model state legislation to authorize the establishment of a range of options for implementation of ATMS.**

ADVANCED TRAFFIC MANAGEMENT SYSTEM FRANCHISE AGREEMENT

THIS ADVANCED TRAFFIC MANAGEMENT SYSTEM FRANCHISE AGREEMENT (the "Franchise Agreement") is entered into by and between [Insert full name of government entity] (the "Franchisor"), a [municipal corporation, or other applicable description] and [insert full name of operator], a [insert state of formation] [corporation/limited partnership] ("Franchisee").

WHEREAS, Franchisor finds that the development of an Advanced Traffic Management System ("ATMS") in [Insert name of area or region] has the potential to be of great benefit to the people of \_\_\_\_\_; and

WHEREAS, ATMS, through the integration of transportation, telecommunications, and computer technology promises to reduce traffic congestion, increase the average rate of traffic flow, improve highway safety, and promote more efficient use of Franchisor's road network; and

WHEREAS, these developments would improve both the economic efficiency of businesses in \_\_\_\_\_ and the quality of life of the residents of \_\_\_\_\_; and

WHEREAS, development of ATMS in \_\_\_\_\_ is thus a necessary and valuable improvement of the basic infrastructure in \_\_\_\_\_; and

WHEREAS, ATMS systems make extensive use of scarce and valuable Public Rights-of-Way, in a manner different from the way in which the general public uses them, and in a manner reserved

primarily for those who provide services to the public, such as utility companies.; and

WHEREAS, an ATMS system should be capable of accommodating both present and reasonably foreseeable future traffic management needs of the community; and

WHEREAS, an ATMS system should be constructed and maintained during the Franchise term so that changes in technology and new services may be integrated to the maximum extent possible into existing system facilities; and

WHEREAS, Franchisee has submitted a proposal for the design, construction, operation and maintenance of an ATMS system in \_\_\_\_\_ to the Governing Body; and

WHEREAS, Franchisor has considered the financial, technical and legal qualifications of Franchisee, and has determined that Franchisee's plans for constructing, operating and maintaining an ATMS system in \_\_\_\_\_ are adequate; and

WHEREAS, Franchisor has relied on Franchisee's representations and has considered the information that Franchisee has presented to it; and

WHEREAS, based on Franchisee's representations and information, the Governing Body has determined that the grant of an exclusive franchise to Franchisee is consistent with the public interest, and has therefore enacted [insert reference to granting ordinance]; and

WHEREAS, Franchisor and Franchisee have reached agreement on the terms and conditions set forth herein;

NOW, THEREFORE, in consideration of Franchisor's grant of a franchise to Franchisee, Franchisee's promise to provide ATMS Service in \_\_\_\_\_ pursuant to and consistent with the terms and conditions set forth herein, the promises and undertakings herein, and other good and valuable consideration, the receipt and the adequacy of which is hereby acknowledged;

THE SIGNATORIES DO HEREBY AGREE AS FOLLOWS:

**1. Definitions and Word Usage**

(a) *Definitions and Usage - General.*

For the purposes of this Agreement, the following terms, phrases, words, and abbreviations shall have the meanings given herein, unless otherwise expressly stated. When not inconsistent with the context, words used in the present tense include the future tense; words in the plural number include the singular number, and words in the singular number include the plural number; and the masculine gender includes the feminine gender. The words "shall" and "will" are mandatory, and "may" is permissive. Unless otherwise expressly stated, words not defined herein shall be given their common and ordinary meaning.

(b) *Affiliate.*

"Affiliate" shall mean any Person who owns or controls, is owned or controlled by, or is under common ownership or control with a Franchisee.

(c) *Ancillary Services.*

"Ancillary Services" shall mean services to the public or portions of the public that are not directly related to ITS and that involve or require access to the Public Rights-of-Way.

(d) *ATIS Service.*

"ATIS Service" shall mean that service provided by an Advanced Traveler Information System, which is a system, including a data base, designed to acquire, analyze, communicate and present real-time and other information to assist travellers in moving from one location to another, both while en route, and before travelling.

(e) *ATMS Service.*

"ATMS Service" shall mean that service provided by an ATMS System.

(f) *ATMS System or System.*<sup>1</sup>

"ATMS System" or "System" shall mean an Advanced Traffic Management System, which is a facility consisting of a set of transmission paths and associated sensing, signal generation, reception, and control equipment that is designed to integrate management of roadway functions by collecting and disseminating data concerning highway use on a real-time basis. ATMS includes any system that provides traffic management through links to traffic control systems that monitor and direct lane access, on-ramp access, signalization and other traffic functions, as well

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<sup>1</sup> ***This definition may -- and should -- be modified to specifically define the scope of the ATMS system to be built in a particular instance.***

as any system that provides information to motorists by means of roadside information display systems. Services made possible by ATMS include: pre-trip planning, en-route driver information, route guidance, ride matching, traveller services information, incident management, travel demand management, and traffic control.

**NOTE: The following should be omitted if the Franchisee is not to provide ATIS service, as under Service Options I and III:**

[For purposes of this Agreement, references to the Franchisee's ATMS System shall be deemed to include such additional facilities and equipment as may be required to enable the Franchisee to provide ATIS Service.]

**NOTE: The following should be included only if the Franchisee's system is to include the capability for electronic toll collection:**

[For purposes of this Agreement, references to the Franchisee's ATMS System shall be deemed to include such additional facilities and equipment as may be required to enable the Franchisee to provide Electronic Toll Collection.]

**NOTE: The following may be omitted if the Franchisee's system is not to include the capability for electronic toll collection:**

(g) AVI.

"AVI" shall mean Automatic Vehicle Identification, which is any system of automatically identifying vehicles as they pass

through a lane of roadway, which may consist generally of interrogator devices installed in the roadway or on elevated structures above or near the roadway; transponder devices attached to vehicles which contain, and may transmit to an interrogator device, identifying account information; and any alternative or later generation technology designed to achieve the same purpose.

**NOTE: The following applies only to Service Options I and XI:**

(h) *Basic ATIS Service.*

"Basic ATIS Service" shall mean those ATIS services that are bundled together with ATMS and offered to the public at little or no cost, including pre-trip planning, en-route driver information, route guidance, ride matching, traveller services information, incident management, travel demand management, and traffic control.

(i) *Data Revenues.*

"Data Revenues" shall mean all revenues arising out of the sale or licensing of data or other information collected, created, derived or developed by the Franchisee in the course of operating the System or providing ITS Services.

**NOTE: The following should be omitted if the Franchisee's system is not to include the capability for electronic toll collection:**

(j) *Electronic Toll Collection.*

"Electronic Toll Collection" shall mean the use of AVI technology to levy and collect tolls, fees and charges for the use of certain portions of the Public Rights-of-Way by vehicular traffic.

(k) FCC.

"FCC" shall mean the Federal Communications Commission, its designee, or any successor governmental entity thereto.

(l) *Franchise.*

"Franchise" shall mean an exclusive<sup>2</sup> authorization granted in accordance with this Agreement to construct, operate, and maintain an ATMS System along the Public Rights-of-Way within the boundaries of Franchisor. Any such authorization, in whatever form granted, shall not mean or include any license or permit required for the privilege of transacting and carrying on a business within the boundaries of Franchisor as required by the ordinances and laws of the relevant jurisdictions , or for attaching devices to poles or other structures, whether owned by Franchisor, another public entity, or a private entity, or for excavating or performing other work in or along Public Rights-of-Way.

(m) *Franchise Agreement.*

"Franchise Agreement" or "Agreement" shall mean this agreement between the Franchisee and Franchisor.

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<sup>2</sup> ***Note that under certain circumstances it may be desirable to grant multiple franchises, in which case the word "exclusive" should be deleted.***

(n) *Franchise Area.*

"Franchise Area" shall mean the area of Franchisor that the Franchisee is authorized to serve by this Franchise Agreement.

(o) *Franchisee.*

"Franchisee" shall mean a natural Person, partnership, domestic or foreign corporation, association, joint venture, or organization of any kind that has been granted an ATMS Franchise by Franchisor.

(p) *Franchisor.*

"Franchisor" shall mean [insert description of the entity granting the Franchise.]

(g) *Governing Body.*

"Governing Body" shall mean [insert description of the governing body of the Franchisor.]

***NOTE: The following definition is used only in connection with Modules D and E:***

(r) *Gross Revenues.*

"Gross Revenues" shall mean the Data Revenues, Service Revenues, and Toll Revenues<sup>3</sup>, and any and all other revenues, credits, property or other consideration of any kind or nature of the Franchisee, its Affiliates, or any Person in which the Franchisee has a financial interest, or of any other Person that operates the System, arising from, attributable to, or in any way derived from the operation of the Franchisee's ATMS System.

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<sup>3</sup> ***The reference to Toll Revenues should be deleted if Electronic Toll Collection is not to be part of the System.***

Gross Revenues shall not include any taxes on services furnished by the Franchisee that are imposed directly on any user by the state, City, or other governmental unit and that are collected by the Franchisee on behalf of said governmental unit. A franchise fee is not such a tax.

(s) *Intelligent Transportation System.*<sup>4</sup>

"Intelligent Transportation System" or "ITS" shall mean any electronic system that may increase the information available to planning or traffic authorities or drivers regarding traffic conditions and/or enable automated tracking or control of vehicles, including ATMS and ATIS.

(t) *ITS Services.*

"ITS Services" shall mean services capable of being provided by an Intelligent Transportation System, including ATIS Service, ATMS Service, and all other services made possible by the construction of the ATMS System.<sup>5</sup>

(u) *Net Profits.*

"Net Profits" shall mean the Gross Revenues, less deductions for the expenses incurred by the Franchisee in the construction, design, operation and maintenance of the System.

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<sup>4</sup> ***Although the contract with FHWA uses the term "IVHS," that term has since been replaced with "ITS." To keep the draft as up-to-date as possible, we will therefore refer to ITS throughout.***

<sup>5</sup> ***This definition is intended to reach all services that could possibly be provided as a result of the construction of an ATMS System, including not only the 29 services that have been designated as part of ITS, but services that have not yet been identified or defined.***

(v) *Person.*

"Person" shall mean an individual, partnership, association, joint stock company, organization, corporation, or any lawful successor thereto or transferee thereof, but such term does not include Franchisor.

(w) *Public Rights-of-Way.*

'Public Rights-of-Way" shall mean the surface, the air space above the surface, and the area below the surface of any public street, highway, lane, path, alley, sidewalk, boulevard, drive, bridge, tunnel, park, parkway, waterway, easement, or similar property in which Franchisor now or hereafter holds any property interest, which, consistent with the purposes for which it was dedicated, may be used for the purpose of installing and maintaining an ATMS System. No reference herein, or in any Franchise Agreement, to a "Public Right-of-Way" shall be deemed to be a representation or guarantee by Franchisor that its interest or other right to control the use of such property is sufficient to permit its use for such purposes, and the Franchisee shall be deemed to gain only those rights to use as are properly in Franchisor and as Franchisor may have the undisputed right and power to give.

(x) *Sale.*

"Sale" shall mean any sale, exchange, or barter transaction.

(y) *Service Revenues.*

"Service Revenues" shall mean all revenues derived from the delivery of ITS Services, except Data Revenues.

**NOTE: The following should be omitted if the Franchisee's system is not to include the capability for electronic toll collection:**

(z) *Toll Revenues.*

"Toll revenues" shall mean all revenues derived from Electronic Toll Collection.

(aa) *Transfer.*

(1) "Transfer" shall mean any transaction in which:

(A) any ownership or other right, title, or interest of more than fifteen percent (15%) in the Franchisee or its ATMS System is transferred, sold, assigned, leased, sublet, or mortgaged, directly or indirectly, in whole or in part; or (B) there is any change, acquisition, or transfer of control of the Franchisee; or (C) the rights and/or obligations held by the Franchisee under the franchise are transferred, directly or indirectly, to another party; or (D) any change or substitution occurs in the managing general partners of the Franchisee; or (E) the Franchisee, or its corporate parents, enter into any transaction that materially increases the debt that is to be borne by the ATMS System directly or indirectly, in a manner that may adversely affect system rates or services; or (F) any assets or property of a Franchisee used or held in connection with an ATMS System are subjected to any lien, mortgage, lease or security interest.

(2) "Control" for purposes of this Section means the legal or practical ability to exert actual working control over the affairs of the Franchisee, either directly or indirectly,

whether by contractual agreement, majority ownership interest, any lesser ownership interest, or in any other manner.

(3) A rebuttable presumption that a transfer of control has occurred shall arise upon the acquisition or accumulation of fifteen percent (15%) or more of the ownership of the grantee by any person or group of persons acting in concert, none of whom already own or control fifty percent (50%) or more of such right or control, singularly or collectively.

## **2. Grant of Franchise**

### *(a) Grant of Franchise.*

The approval by the Governing Body of this Franchise Agreement shall constitute the grant of a Franchise to the Franchisee, subject to the terms and conditions of this Franchise Agreement and any applicable federal state or local laws or ordinances. The Franchise grants the Franchisee the exclusive<sup>6</sup> right to construct, operate and maintain an ATMS System along the Public Rights-of-Way, for the sole purpose of providing ATMS Service, ATIS Service,<sup>7</sup> Electronic Toll Collection,<sup>8</sup> and such other ITS Services as Franchisor and the Franchisee may subsequently agree may be provided under this Franchise. No privilege or power of eminent domain is bestowed by this grant;

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<sup>6</sup> ***Note that under certain circumstances it may be desirable to grant multiple franchises, in which case the word "exclusive" should be deleted.***

<sup>7</sup> ***This reference to ATIS Service should be deleted under Service Options I and III.***

<sup>8</sup> ***The reference to Electronic Toll Collection should be deleted if it is not to be part of the System.***

nor is such a privilege or power bestowed by this Agreement. This Agreement does not confer any rights other than as expressly provided herein or as mandated by federal, state or local law.

(b) *Franchise Area.*

The Franchise is issued for the entire present territorial limits of Franchisor and any area annexed thereto during the term of the Franchise.<sup>9</sup>

(c) *Franchise Term.*

The Franchise is issued for a term of [\_\_\_\_\_ (\_\_\_\_) years] from the effective date of this Franchise Agreement, unless the Franchise is earlier revoked or its term shortened as provided herein. The Franchisee may apply for renewal or extension pursuant to Section 10 hereof.

(d) *Franchise Characteristics.*

(1) The Franchise authorizes use of Public Rights-of-Way for installing traffic and weather sensing devices, roadside message display equipment, beacons, transmitters, antennas, cables, wires, lines, optical fiber, underground conduit, video cameras and other devices necessary and appurtenant to the operation of an ATMS System within a Franchise Area, but does not authorize a Franchisee to install an ATMS System on private property without owner consent or to use publicly or privately owned conduits without a separate agreement with the owners.

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<sup>9</sup> ***Note that it may be desirable, particularly in a large region, to grant multiple franchises, each for a defined portion of the Franchisor's territory.***

(2) The Franchise is exclusive<sup>10</sup> and explicitly precludes the issuance of other Franchises to operate ATMS Systems within the franchise area defined in Section 2(b), except that nothing in this Agreement shall limit or otherwise affect Franchisor's right to itself construct, operate, or maintain an ATMS System, with or without a Franchise, or to grant additional franchises for the provision of ATIS Service.<sup>11</sup>

(3) Upon its approval by the Governing Body, this Franchise Agreement shall constitute a contract between the Franchisee and Franchisor, and the terms, conditions, and provisions of this Franchise Agreement, subject to all duly enacted and applicable laws, shall define the rights and obligations of the Franchisee and Franchisor relating to the Franchise.

(4) All privileges prescribed by the Franchise shall be subordinate to any prior lawful occupancy of the Public Rights-of-Way, and Franchisor reserves the right to reasonably designate where a Franchisee's facilities are to be placed within the Public Rights-of-Way.

(5) The Franchise shall be a privilege that is in the public trust and personal to the original Franchisee. No Transfer of the Franchise shall occur without the prior consent

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<sup>10</sup> ***Note that under certain circumstances it may be desirable to grant multiple franchises, in which case the word "exclusive" should be deleted,***

<sup>11</sup> ***This reference to ATIS Service should be deleted under Service Options I and III.***

of Franchisor and unless application is made by the Franchisee and City approval'obtained.

*(e) Franchise and Franchisee  
Subject to Other Laws, Police Power.*

(1) The Franchisee shall at all times be subject to and shall comply with all applicable federal, state, and local laws.

(2) This Franchise Agreement is subject to and shall be governed by all terms and conditions of any applicable provisions of federal, state, or local law.

(3) All rights and privileges granted herein are subject to the police powers of Franchisor and its rights under applicable laws and regulations to regulate the Franchisee and the construction, operation and maintenance of the Franchisee's System, including, but not limited to, the right to adopt and enforce ordinances and regulations pertaining to traffic safety, management and control, the right to adopt additional ordinances and regulations as Franchisor shall find necessary in the exercise of its police powers, the right to adopt and enforce applicable zoning, building, permitting and safety ordinances and regulations, the right to adopt and enforce ordinances and regulations relating to equal employment opportunities, and the right to adopt and enforce ordinances and regulations containing

right-of-way, telecommunications, utility and cable television consumer protection and service standards.<sup>12</sup>

(4) No course of dealing between the Franchisee and Franchisor, or any delay on the part of Franchisor in exercising any rights hereunder, shall operate as a waiver of any such rights of Franchisor or acquiescence in the actions of the Franchisee in contravention of rights except to the extent expressly waived by Franchisor or expressly provided for in this Franchise Agreement.

(5) Franchisor shall have the maximum plenary authority to regulate ATMS Systems, Franchisees, and Franchises as may now or hereafter be lawfully permissible; except where Franchisor's rights are expressly waived by this Franchise Agreement, they are reserved, whether expressly enumerated or not.

(6) Under no circumstances shall this Franchise constitute the grant of authority to exercise the traffic control and traffic operations management functions of the Franchisor or any public safety organization, except as specifically provided herein or in an Annual Operations Plan, as defined in Section 5(a).

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<sup>12</sup> ***Note that there may be questions about the authority of a multi-jurisdictional agency to exercise all of the powers mentioned in this section. If so, it may be necessary to amend or delete this section, as well as to make other arrangements -- possibly including separate agreements or franchises with the various separate jurisdictions making up or comprised within the Franchisor.***

(f) *Approval and Effective Date.*

This Franchise Agreement shall become effective upon its execution by Franchisor and the Franchisee, and its subsequent approval by the Governing Body.

(g) *Effect of Acceptance.*

By accepting the Franchise and executing this Franchise Agreement, the Franchisee (1) acknowledges and accepts Franchisor's legal right to grant the Franchise, to enter this Franchise Agreement, and to enact and enforce ordinances and regulations related to the Franchise, (2) agrees that it will not oppose intervention by Franchisor in any proceeding affecting the Franchisee's ATMS System, (3) accepts and agrees to comply with each provision of this Agreement, and (4) agrees that the Franchise was granted pursuant to processes and procedures consistent with applicable law, and that it will not raise any claim to the contrary.

(h) *No Waiver.*

(1) The failure of Franchisor on one or more occasions to exercise a right or to require compliance or performance under this Franchise Agreement or any applicable law shall not be deemed to constitute a waiver of such right or a waiver of compliance or performance by the Franchise, unless such right or such compliance or performance has been specifically waived in writing.

(2) Waiver of a breach of this Agreement shall not be a waiver of any other breach, whether similar to or different

from that waived. Neither the granting of the Franchise, nor any provision herein, nor any action by Franchisor hereunder shall constitute a waiver of or a bar to the exercise of any governmental right or power of Franchisor, including without limitation the right of eminent domain.

(i) *Construction of Franchise Agreement.*

The provisions of this Franchise Agreement shall be liberally construed in favor of Franchisor in order to promote the public interest. References to applicable law or applicable requirements refer to applicable law or requirements as the same may be amended from time to time.

(j) *Amendment of Franchise Agreement.*

Franchisor shall liberally amend this Franchise Agreement upon the application of the Franchisee whenever necessary to enable the Franchisee to take advantage of developments in the fields of telecommunications and traffic management that, in Franchisor's opinion, will afford the Franchisee an opportunity to serve the public more efficiently, effectively and economically. Such amendments shall be subject to such conditions as Franchisor determines are appropriate to protect the public interest.

(k) *Governing Law.*

Except as to matters that are governed solely by federal law or regulation, this Franchise Agreement will be governed by and construed in accordance with the laws of the State of \_\_\_\_\_

(1) *Acts at Franchisee's Expense.*

Unless otherwise expressly provided in this Franchise Agreement, all acts that the Franchisee is required to perform under this Agreement or applicable law shall be performed at the Franchisee's own cost and expense.

(m) *Eminent Domain.*

Nothing herein shall be deemed or construed to impair or affect, in any way or to any extent, the right of Franchisor to acquire the property of the Franchisee through the exercise of the right of eminent domain, and nothing herein contained shall be construed to contract away or to modify or abridge, either for a term or in perpetuity, Franchisor's right of eminent domain with respect to any public utility.

**MODULE A--PURE PUBLIC GOOD:**

**3. Compensation and Revenues**

(a) *Base Franchise Fee.*<sup>13</sup>

The parties agree that the Public Rights-of-Way to be used by the Franchisee for the construction and operation of the ATMS System are valuable public property acquired and maintained at great expense to the taxpayers. In compensation for the right to enter and occupy the Public Rights-of-Way, the Franchisee shall

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<sup>13</sup> ***The purpose of this provision is to protect the City's claim to the right of compensation for use of the rights-of-way, The amount is nominal because under this module the Franchisee is not expected to earn a significant amount of revenue from operation of the System.***

pay Franchisor a Base Franchise Fee of five dollars (\$5.00) per year.

(b) *Design and Construction Costs.*

The Franchisee shall be responsible for the design and construction of the ATMS System in accordance with Section 4 of this Agreement.<sup>14</sup> Franchisor shall reimburse the Franchisee for all costs of design and construction and compensate Franchisee for performing design and construction services in accordance with the terms of the budget included in the Construction Plan developed pursuant to Section 4(a).<sup>15</sup>

(c) *Operating and Maintenance Costs.*

The Franchisee shall be responsible for the operation and maintenance of the System, in accordance with the terms of this Agreement. Each year, Franchisor and the Franchisee shall jointly prepare and agree on the terms of an Annual Operating Budget as provided in Section 5(b) of this Agreement. Franchisor

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<sup>14</sup> ***It may be preferable for the Franchisor to perform all design work. In that case, this section should be revised accordingly.***

<sup>15</sup> ***The reference to compensating the Franchisee for services provided is intended to include an allowance for whatever profit the parties determine is reasonable. Note that substantial additional detail regarding the amount, timing and nature of compensation can be incorporated in the terms of the Construction Plan. In the alternative, the parties may wish to revise this and the following section to address the issue of cost reimbursement and compensation in more detail. Under this module, there is no need for revenue sharing options because there is no private funding. The private sector partner will be compensated not by retaining project revenues, but by payments from the government for its services. The public sector funding required to build the system and compensate the franchisee could come from several sources, as discussed in the Introductory Note.***

shall then reimburse the Franchisee for the cost of operating and maintaining the system and compensate the Franchisee for services provided, in accordance with the terms of the agreed-upon Annual Operating Budget.<sup>16</sup>

(d) *System Revenues.*

The Gross Revenues, whether collected by Franchisor, the Franchisee, or any other entity, shall be the property of Franchisor and shall be disbursed to Franchisor as provided in each Annual Operating Budget, unless otherwise agreed to in an Annual Operating Budget.

*MODULE B -- PARTIAL PUBLIC GOOD:*

**3. Compensation and Revenues**

(a) *Base Franchise Fee.*<sup>17</sup>

The parties agree that the Public Rights-of-Way to be used by the Franchisee for the construction and operation of the ATMS

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<sup>16</sup> *The reference to compensating the Franchisee for services provided is intended to include an allowance for whatever profit the parties determine is reasonable. Note that substantial additional detail regarding the amount, timing and nature of compensation can be incorporated in the terms of the Annual Operating Budget. In the alternative, the parties may wish to revise this and the preceding section to address the issue of cost reimbursement and compensation in more detail. Under this module, there is no need for revenue sharing options because there is no private funding. The private sector partner will be compensated not by retaining project revenues, but by payments from the government for its services. The public sector funding required to build the system and compensate the franchisee could come from several sources, as discussed in the Introductory Note.*

<sup>17</sup> *The purpose of this provision is to protect the City's claim to the right of compensation for use of the rights-of-way. The amount is nominal because under this module the Franchisee is not expected to earn a profit from operation of the System.*

System are valuable public property acquired and maintained at great expense to the taxpayers. In compensation for the right to enter and occupy the Public Rights-of-Way, the Franchisee shall pay Franchisor a Base Franchise Fee of five dollars (\$5.00) per year.

(b) *Design and Construction Costs.*

The Franchisee shall be responsible for the design and construction of the ATMS System in accordance with Section 4 of this Agreement.<sup>18</sup> Franchisor shall reimburse the Franchisee for all costs of design and construction and compensate Franchisee for performing design and construction services in accordance with the terms of the budget included in the Construction Plan developed pursuant to Section 4(a).<sup>19</sup>

(c) *Operating and Maintenance Costs.*

The Franchisee shall be responsible for the operation and maintenance of the System, in accordance with the terms of this

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<sup>18</sup> ***It may be preferable for the Franchisor to perform all design work, In that case, this section should be revised accordingly.***

<sup>19</sup> ***The reference to compensating the Franchisee for services provided is intended to include an allowance for whatever profit the parties determine is reasonable. Note that substantial additional detail regarding the amount, timing and nature of compensation can be incorporated in the terms of the Construction Plan. In the alternative, the parties may wish to revise this and the following section to address the issue of cost reimbursement and compensation in more detail. Under this module, there is no need for revenue sharing options because there is no private funding. The private sector partner will be compensated not by retaining project revenues, but by payments from the government for its services, The public sector funding required to build the system and compensate the franchisee could come from several sources, as discussed in the Introductory Note.***

Agreement. Each year, Franchisor and the Franchisee shall jointly prepare and agree on the terms of an Annual Operating Budget as provided in Section 5(b) of this Agreement. To the extent that the Gross Revenues do not equal the sum of operating costs and a reasonable profit (which shall not exceed \_\_ percent (\_\_\_%) of operating costs), Franchisor shall compensate the Franchisee for operations and maintenance, in accordance with the terms of the agreed-upon Annual Operating Budget.

(d) *System Revenues.*<sup>20</sup>

The Franchisee shall retain the Gross Revenues up to a maximum of the sum of operating costs and a reasonable profit (which shall not exceed \_\_ percent (\_\_\_%) of operating costs); any Gross Revenues in excess of the foregoing amount shall be the property of Franchisor and shall be disbursed to Franchisor as provided in each Annual Operating Budget, unless otherwise agreed to in an Annual Operating Budget.

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<sup>20</sup> ***As with Module A, no options for compensation models are required. The public sector is underwriting the project to the degree required and the private sector partner is compensated through a combination of project revenues and public sector contributions. The public sector funds may come from various sources, as discussed in the Introductory Notes.***

**MODULE C -- PROJECT AT BREAK-EVEN:**

**3. Compensation and Revenues**

**(a) Base Franchise Fee.<sup>21</sup>**

The parties agree that the Public Rights-of-Way to be used by the Franchisee for the construction and operation of the ATMS System are valuable public property acquired and maintained at great expense to the taxpayers. In compensation for the right to enter and occupy the Public Rights-of-Way, the Franchisee shall pay Franchisor a Base Franchise Fee of five dollars (\$5.00) per year.

**(b) System Costs.**

The Franchisee shall be responsible for the design, construction, operation and maintenance of the ATMS System in accordance with all the terms of this Agreement, and shall bear all the costs thereof.<sup>22</sup> Each year, Franchisor and the Franchisee shall jointly prepare and agree on the terms of an Annual Operating Budget as provided in Section 5(b) of this Agreement. Franchisor shall compensate the Franchisee for

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<sup>21</sup> ***The purpose of this provision is to protect the City's claim to the right of compensation for use of the rights-of-way. The amount is nominal because under this module the Franchisee is not expected to earn a profit from operation of the System.***

<sup>22</sup> ***It may be preferable for the Franchisor to perform all design work. In that case, this section should be revised accordingly. In addition, it may be desirable for the Franchisor to assist in the financing of the project -- as discussed in the Introductory Note -- to reduce the Franchisee's costs and increase the profitability of the project. No change in this section would be needed in that case, unless projections showed that the Franchisor would not need to supplement Gross Revenues to assure profitability.***

services provided, to the extent that the Gross Revenues do not provide the Franchisee a reasonable profit (which shall not exceed \_\_ percent(\_\_\_\_%) of annual costs), in accordance with the terms of the agreed-upon Annual Operating Budget.

(c) *System Revenues.*

The Franchisee shall retain the Gross Revenues, unless otherwise agreed to in an Annual Operating Budget.

*MODULE D -- OPERATIONS PROFITABLE:*

**3. Compensation and Revenues<sup>23</sup>**

(a) *Base Franchise Fee.*<sup>24</sup>

The parties agree that the Public Rights-of-Way to be used by the Franchisee for the construction and operation of the ATMS System are valuable public property acquired and maintained at great expense to the taxpayers. In compensation for the right to enter and occupy the Public Rights-of-Way, the Franchisee shall pay Franchisor a Base Franchise Fee of five dollars (\$5.00) per year.

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<sup>23</sup> ***In this Module, the public sector will finance the construction of the system and be repaid out of the proceeds of operations. The private sector partner will be compensated for its services in connection with design and construction, and will retain the proceeds of operations to cover its expenses and pay a profit. It is important to bear in mind that there are many ways for the parties to ensure that each is properly compensated for its investment, its property rights and its services. This section proposes several methods, which may be used singly or in combination. It is impossible to prepare a complete model addressing this issue because so much depends on the economics of a particular project and the situations and needs of the parties.***

<sup>24</sup> ***This provision could be deleted, since under this module the Franchisee is expected to earn a profit from operation of the System, and will pay an Additional Franchise Fee.***

(b) *Design and Construction Costs.*

The Franchisee shall be responsible for the design and construction of the ATMS System in accordance with Section 4 of this Agreement.<sup>25</sup> Franchisor shall reimburse the Franchisee for all costs of design and construction and compensate Franchisee for performing design and construction services in accordance with the terms of the budget included in the Construction Plan developed pursuant to Section 4(a).<sup>26</sup>

(c) *Operating and Maintenance Costs.*

The Franchisee shall be responsible for the operation and maintenance of the System, in accordance with the terms of this Agreement, and shall bear all the costs thereof.

(d) *System Revenues.*

The Franchisee shall retain the Gross Revenues.

**COMPENSATION OPTION I:**

(e) *Additional Compensation to Franchisor.*

As additional consideration for the Franchisee's use of the Public Rights-of-Way, in recognition that the Franchise constitutes a valuable and exclusive property right without which the Franchisee would be required to invest substantial additional

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<sup>25</sup> *It may be preferable for the Franchisor to perform all design work. In that case, this section should be revised accordingly.*

<sup>26</sup> *The reference to compensating the Franchisee for services provided is intended to include an allowance for whatever profit the parties determine is reasonable. Note that substantial additional detail regarding the amount, timing and nature of compensation can be incorporated in the terms of the Construction Plan.*

capital, and to reimburse Franchisor for the costs of designing and building the System, the Franchisee shall pay Franchisor an Additional Franchise Fee of \_\_\_\_\_ (\$\_\_\_\_\_).<sup>27</sup>

(f) *Not a Tax or in Lieu of Any Other Tax or Fee.*

(1) Payment of the Additional Franchise Fee shall not be considered in the nature of a tax,

(2) The Additional Franchise Fee is in addition to all other taxes and payments that the Franchisee may be required to pay under any federal, state, or local law.

(g) *Payments.*

(1) The Additional Franchise Fee and any other costs assessed by Franchisor against the Franchisee shall be paid monthly to Franchisor and shall commence as of the effective date of the Franchise. Monthly payments shall be made to Franchisor no later than fifteen (15) days following the end of each month. The Franchisee shall provide an annual complete statement of its payments for each calendar year within ninety (90) days from the end of that calendar year.

(2) In the event any franchise fee payment or recomputation amount is not made on or before the date specified herein, the Franchisee shall pay additional compensation and interest charges computed from such due date, at an annual rate

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<sup>27</sup> ***Compensation Option I calls for a flat monthly fee based on the economics of the project. This is the simplest option, but it does not reflect the true value of the Public Rights-of-Way to the Franchisee, and if the System is more successful than projected, may not give the Franchisor an equitable share of revenue.***

equal to the commercial prime interest rate of Franchisor's primary depository bank during the period such unpaid amount is owed.

**COMPENSATION OPTION II:**

(e) *Additional Compensation to Franchisor.*

As additional consideration for the Franchisee's use of the Public Rights-of-Way, in recognition that the Franchise constitutes a valuable and exclusive property right without which the Franchisee would be required to invest substantial additional capital, and to reimburse Franchisor for the costs of designing and building the System, the Franchisee shall pay Franchisor an Additional Franchise Fee based on the extent of the Franchisee's use of the Public Rights-of-Way, as measured by the quantity of equipment and other facilities installed by the Franchisee in the Public Rights-of-Way. The Additional Franchise Fee shall be calculated by multiplying the number of units of each type of equipment or facility listed in Exhibit E that Franchisee has installed in the Public Rights-of-Way by the unit rate listed in Exhibit E.<sup>28</sup>

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<sup>28</sup> ***Compensation Option II attempts to equate the Additional Franchise Fee to the actual level of occupancy of the Public Rights-of-Way. It is cumbersome and inexact as a measure of the value of the Public Rights-of-Way to the Franchisee and does not directly defray the Franchisor's investment in the project.***

(f) *Not a Tax or in Lieu of Any Other Tax or Fee.*

(1) Payment of the Additional Franchise Fee shall not be considered in the nature of a tax.

(2) The Additional Franchise Fee is in addition to all other taxes and payments that the Franchisee may be required to pay under any federal, state, or local law.

(g) *Payments.*

(1) The Additional Franchise Fee and any other costs assessed by Franchisor against the Franchisee shall be paid monthly to Franchisor and shall commence as of the effective date of the Franchise. Franchisor shall be furnished at the time of each payment with a statement certified by the Franchisee's chief financial officer or an independent engineering firm stating the number of units of each type of equipment or facility listed in Exhibit E that have been installed in the Public Rights-of-Way pursuant to this Franchise, as of the end of the relevant payment period. Monthly payments shall be made to Franchisor no later than fifteen (15) days following the end of each month. An annual statement verifying the number of items of equipment or facility installed in the Public Rights-of-Way shall be furnished to Franchisor by an independent engineering firm. The Franchisee shall provide an annual complete audit statement of its payments for each calendar year within ninety (90) days from the end of that calendar year.

(2) In the event any franchise fee payment or recomputation amount is not made on or before the date specified

herein, the Franchisee shall pay additional compensation and interest charges computed from such due date, at an annual rate equal to the commercial prime interest rate of Franchisor's primary depository bank during the period such unpaid amount is owed.

(h) *Audit.*

(1) Franchisor shall have the right to inspect and copy records and the rights to audit and to recompute any amounts determined to be payable under this Agreement, whether the records are held by the Franchisee, an Affiliate, or any other entity that collects or receives funds related to the Franchisee's operation in Franchisor, including, by way of illustration and not limitation, any entity that sells advertising on the Franchisee's behalf. The Franchisee shall be responsible for providing the records to Franchisor, without regard to what entity holds the records. The records shall be maintained for at least three (3) years after the termination of the Franchise, including any renewal term. Franchisor's audit expenses shall be borne by Franchisor unless the audit discloses an underpayment, in which case the costs of the audit shall be borne by the Franchisee as a cost incidental to the enforcement of the Franchise. Any additional amounts due to Franchisor as a result of the audit shall be paid within thirty (30) days following written notice to the Franchisee by Franchisor of the underpayment, which notice shall include a copy of the audit report. If recomputation results in additional revenue to be

paid to Franchisor, such amount shall be subject to a 10 percent (10%) interest charge.

(2) The Franchisee shall maintain its fiscal and financial records and have all relevant fiscal and financial records maintained by others on its behalf in such a manner as to enable Franchisor to determine the amount of the Additional Franchise Fee.

**COMPENSATION OPTION III:**

*(e) Additional Compensation to Franchisor.*

As additional consideration for the Franchisee's use of the Public Rights-of-Way, in recognition that the Franchise constitutes a valuable and exclusive property right without which the Franchisee would be required to invest substantial additional capital, and to reimburse Franchisor for the costs of designing and building the System, the Franchisee shall pay Franchisor an Additional Franchise Fee of fifty percent (50%) of its Net Profits.<sup>29</sup>

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<sup>29</sup> *Compensation Option III calls for splitting the net profits of the project equally between the two partners. of course, the percentage split can be adjusted, if required to ensure both parties get a fair return on their investment. The drawback of a division of net profits is that it raises the potential for accounting practices designed to reduce or even eliminate the appearance of any profit. This would face the Franchisor with the prospect of receiving no return at all,*

(f) *Not a Tax or in Lieu of Any Other Tax or Fee.*

(1) Payment of the Additional Franchise Fee shall not be considered in the nature of a tax.

(2) The Additional Franchise Fee is in addition to all other taxes and payments that the Franchisee may be required to pay under any federal, state, or local law.

(g) *Payments.*

(1) The Additional Franchise Fee and any other costs assessed by Franchisor against the Franchisee shall be paid monthly to Franchisor and shall commence as of the effective date of the Franchise. Franchisor shall be furnished at the time of each payment with a statement certified by the Franchisee's chief financial officer or an independent certified public accountant reflecting the total amount of monthly Net Profits for the payment period. Monthly payments shall be made to Franchisor no later than fifteen (15) days following the end of each month. An annual statement of Net Profits shall be furnished to Franchisor by an independent, certified public accountant. The Franchisee shall provide an annual complete audit statement for each calendar year within ninety (90) days from the end of that calendar year.

(2) In the event any franchise fee payment or recomputation amount is not made on or before the date specified herein, the Franchisee shall pay additional compensation and interest charges computed from such due date, at an annual rate equal to the commercial prime interest rate of Franchisor's

primary depository bank during the period such unpaid amount is owed.

(h) *Audit.*

(1) Franchisor shall have the right to inspect and copy records and the rights to audit and to recompute any amounts determined to be payable under this Agreement, whether the records are held by the Franchisee, an Affiliate, or any other entity that collects or receives funds related to the Franchisee's operation in Franchisor, including, by way of illustration and not limitation, any entity that sells advertising on the Franchisee's behalf. The Franchisee shall be responsible for providing the records to Franchisor, without regard to what entity holds the records. The records shall be maintained for at least three (3) years after the termination of the Franchise, including any renewal term. Franchisor's audit expenses shall be borne by Franchisor unless the audit discloses an underpayment, in which case the costs of the audit shall be borne by the Franchisee as a cost incidental to the enforcement of the Franchise. Any additional amounts due to Franchisor as a result of the audit shall be paid within thirty (30) days following written notice to the Franchisee by Franchisor of the underpayment, which notice shall include a copy of the audit report. If recomputation results in additional revenue to be paid to Franchisor, such amount shall be subject to a 10 percent (10%) interest charge.

(2) The Franchisee shall maintain its fiscal and financial records and have all relevant fiscal and financial records maintained by others on its behalf in such a manner as to enable Franchisor to determine Net Profits.

**COMPENSATION OPTION IV:**

*(e) Additional Compensation to Franchisor.*

As additional consideration for the Franchisee's use of the Public Rights-of-Way, in recognition that the Franchise constitutes a valuable and exclusive property right without which the Franchisee would be required to invest substantial additional capital, and to reimburse franchisor for the costs of designing and building the System, the Franchisee shall pay Franchisor an Additional Franchise Fee of five percent (5%) of its Gross Revenues.<sup>30</sup>

*(f) Not a Tax or in Lieu of Any Other Tax or Fee.*

(3) Payment of the Additional Franchise Fee shall not be considered in the nature of a tax.

(4) The Additional Franchise Fee is in addition to all other taxes and payments that the Franchisee may be required to pay under any federal, state, or local law.

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<sup>30</sup> ***Compensation Option IV calls for a fee based on the Franchisee's Gross Revenues. The figure of 5% used in the draft can be adjusted to reflect the proportion between cost reimbursement and profit that the parties intend the Franchisor to receive over the term of the Franchise. This option most accurately captures the value of the use of the Public Rights-of-Way to the Franchisee and treats compensation for that right as an expense of doing business.***

(g) *Payments.*

(1) The Additional Franchise Fee and any other costs assessed by Franchisor against the Franchisee shall be paid monthly to Franchisor and shall commence as of the effective date of the Franchise. Franchisor shall be furnished at the time of each payment with a statement certified by the Franchisee's chief financial officer or an independent certified public accountant reflecting the total amount of monthly Gross Revenues for the payment period. Monthly payments shall be made to Franchisor no later than fifteen (15) days following the end of each month. An annual statement of Gross Revenues shall be furnished to Franchisor by an independent, certified public accountant. The Franchisee shall provide an annual complete audit statement for each calendar year within ninety (90) days from the end of that calendar year.

(2) In the event any franchise fee payment or recomputation amount is not made on or before the date specified herein, the Franchisee shall pay additional compensation and interest charges computed from such due date, at an annual rate equal to the commercial prime interest rate of Franchisor's primary depository bank during the period such unpaid amount is owed.

(h) *Audit.*

(1) Franchisor shall have the right to inspect and copy records and the rights to audit and to recompute any amounts determined to be payable under this Agreement, whether the

records are held by the Franchisee, an Affiliate, or any other entity that collects or receives funds related to the Franchisee's operation in Franchisor, including, by way of illustration and not limitation, any entity that sells advertising on the Franchisee's behalf. The Franchisee shall be responsible for providing the records to Franchisor, without regard to what entity holds the records. The records shall be maintained for at least three (3) years after the termination of the Franchise, including any renewal term. Franchisor's audit expenses shall be borne by Franchisor unless the audit discloses an underpayment, in which case the costs of the audit shall be borne by the Franchisee as a cost incidental to the enforcement of the Franchise. Any additional amounts due to Franchisor as a result of the audit shall be paid within thirty (30) days following written notice to the Franchisee by Franchisor of the underpayment, which notice shall include a copy of the audit report. If recomputation results in additional revenue to be paid to Franchisor, such amount shall be subject to a 10 percent (10%) interest charge.

(2) The Franchisee shall maintain its fiscal and financial records and have all relevant fiscal and financial records maintained by others on its behalf in such a manner as to enable Franchisor to determine Gross Revenues.

3. Compensation and Revenue<sup>31</sup>

(a) Base Franchise Fee.<sup>32</sup>

The parties agree that the Public Rights-of-Way to be used by the Franchisee for the construction and operation of the ATMS System are valuable public property acquired and maintained at great expense to the taxpayers. In compensation for the right to enter and occupy the Public Rights-of-Way, the Franchisee shall pay Franchisor a Base Franchise Fee of five dollars (\$5.00) per year.

(b) system costs.

The Franchisee shall be responsible for the design, construction, operation and maintenance of the ATMS System in accordance with all the terms of this Agreement, and shall bear all the costs thereof.<sup>33</sup>

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<sup>31</sup> *In this Module, the private sector will finance the construction of the system and be repaid out of revenues. The public sector partner will be compensated for the use of the Public Rights-of-Way, without which the project could not be built. It is important to bear in mind that there are many ways for the parties to ensure that each is properly compensated for its investment, its property rights and its services. This section proposes several methods, which may be used singly or in combination. It is impossible to prepare a complete model addressing this issue because so much depends on the economics of a particular project and the situations and needs of the parties.*

<sup>32</sup> *This provision could be deleted, since under this module the Franchisee is expected to earn a profit from operation of the System, and will pay an Additional Franchise Fee.*

<sup>33</sup> *It may be preferable for the Franchisor to perform all design work, In that case, this section should be revised accordingly.*

(c) *System Revenues.*

The Franchisee shall retain the Gross Revenues.

**COMPENSATION OPTION I:**

(d) *Additional Franchise Fee.*

As additional consideration for the Franchisee's use of the Public Rights-of-Way, in recognition that the Franchise constitutes a valuable and exclusive property right without which the Franchisee would be required to invest substantial additional capital, the Franchisee shall pay Franchisor an Additional Franchise Fee of \_\_\_\_\_ (\$\_\_\_\_\_).<sup>34</sup>

(e) *Not a Tax or in Lieu of Any Other Tax or Fee.*

(1) Payment of the Additional Franchise Fee shall not be considered in the nature of a tax.

(2) The Additional Franchise Fee is in addition to all other taxes and payments that the Franchisee may be required to pay under any federal, state, or local law.

(g) *Payments.*

(1) The Additional Franchise Fee and any other costs assessed by Franchisor against the Franchisee shall be paid monthly to Franchisor and shall commence as of the effective date of the Franchise. Monthly payments shall be made to Franchisor no later than fifteen (15) days following the end of each month.

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<sup>34</sup> ***Compensation Option I calls for a flat monthly fee based on the economics of the project. This is the simplest option, but it does not reflect the true value of the Public Rights-of-Way to the Franchisee, and if the System is more successful than projected, will not give the Franchisor an equitable share of revenue.***

The Franchisee shall provide an annual complete statement of its payments for each calendar year within ninety (90) days from the end of that calendar year.

(2) In the event any franchise fee payment or recomputation amount is not made on or before the date specified herein, the Franchisee shall pay additional compensation and interest charges computed from such due date, at an annual rate equal to the commercial prime interest rate of Franchisor's primary depository bank during the period such unpaid amount is owed.

**COMPENSATION OPTION II:**

(d) *Additional Franchise Fee.*

As additional consideration for the Franchisee's use of the Public Rights-of-Way, and in recognition that the Franchise constitutes a valuable and exclusive property right without which the Franchisee would be required to invest substantial additional capital, the Franchisee shall pay Franchisor an Additional Franchise Fee based on the extent of the Franchisee's use of the Public Rights-of-Way, as measured by the quantity of equipment and other facilities installed by the Franchisee in the Public Rights-of-Way. The Additional Franchise Fee shall be calculated by multiplying the number of units of each type of equipment or

facility listed in Exhibit E that Franchisee has installed in the Public Rights-of-Way by the unit rate listed in Exhibit E.<sup>35</sup>

(e) *Not a Tax or in Lieu of Any Other Tax or Fee.*

(1) Payment of the Additional Franchise Fee shall not be considered in the nature of a tax.

(2) The Additional Franchise Fee is in addition to all other taxes and payments that the Franchisee may be required to pay under any federal, state, or local law.

(f) *Payments.*

(1) The Additional Franchise Fee and any other costs assessed by Franchisor against the Franchisee shall be paid monthly to Franchisor and shall commence as of the effective date of the Franchise. Franchisor shall be furnished at the time of each payment with a statement certified by the Franchisee's chief financial officer or an independent engineering firm stating the number of units of each type of equipment or facility listed in Exhibit E that have been installed in the Public Rights-of-Way pursuant to this Franchise, as of the end of the relevant payment period. Monthly payments shall be made to Franchisor no later than fifteen (15) days following the end of each month. An annual statement verifying the number of items of equipment or facility installed in the Public Rights-of-Way shall be furnished

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<sup>35</sup> ***Compensation Option II attempts to equate the Additional Franchise Fee to the actual level of occupancy of the Public Rights-of-Way. It is cumbersome and inexact as a measure of the value of the Public Rights-of-Way to the Franchisee and does not directly defray the Franchisor's investment in the project.***

to Franchisor by an independent engineering firm. The Franchisee shall provide an annual complete audit statement of its payments for each calendar year within ninety (90) days from the end of that calendar year.

(2) In the event any franchise fee payment or recomputation amount is not made on or before the date specified herein, the Franchisee shall pay additional compensation and interest charges computed from such due date, at an annual rate equal to the commercial prime interest rate of Franchisor's primary depository bank during the period such unpaid amount is owed.

*(g) Audit.*

(1) Franchisor shall have the right to inspect and copy records and the rights to audit and to recompute any amounts determined to be payable under this Agreement, whether the records are held by the Franchisee, an Affiliate, or any other entity that collects or receives funds related to the Franchisee's operation in Franchisor, including, by way of illustration and not limitation, any entity that sells advertising on the Franchisee's behalf. The Franchisee shall be responsible for providing the records to Franchisor, without regard to what entity holds the records. The records shall be maintained for at least three (3) years after the termination of the Franchise, including any renewal term. Franchisor's audit expenses shall be borne by Franchisor unless the audit discloses an underpayment, in which case the costs of the audit shall be

borne by the Franchisee as a cost incidental to the enforcement of the Franchise.' Any additional amounts due to Franchisor as a result of the audit shall be paid within thirty (30) days following written notice to the Franchisee by Franchisor of the underpayment, which notice shall include a copy of the audit report. If recomputation results in additional revenue to be paid to Franchisor, such amount shall be subject to a 10 percent (10%) interest charge.

(2) The Franchisee shall maintain its fiscal and financial records and have all relevant fiscal and financial records maintained by others on its behalf in such a manner as to enable Franchisor to determine the amount of the Additional Franchise Fee.

**COMPENSATION OPTION III:**

(d) *Additional Franchise Fee.*

As additional consideration for the Franchisee's use of the Public Rights-of-Way, in recognition that the Franchise constitutes a valuable and exclusive property right without which the Franchisee would be required to invest substantial additional capital, the Franchisee shall pay Franchisor an Additional Franchise Fee of fifty percent (50%) of its Net Profits.<sup>36</sup>

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<sup>36</sup> *Compensation Option III calls for splitting the net profits of the project equally between the two partners. Of course, the percentage split can be adjusted, if required to ensure both parties get a fair return on their investment. The drawback of a division of net profits is that it raises the potential for accounting practices designed to reduce or even eliminate the appearance of any profit. This would face the Franchisor with the prospect of receiving no return at all.*

(e) *Not a Tax or in Lieu of Any Other Tax or Fee.*

(1) Payment of the Additional Franchise Fee shall not be considered in the nature of a tax.

(2) The Additional Franchise Fee is in addition to all other taxes and payments that the Franchisee may be required to pay under any federal, state, or local law.

(g) *Payments.*

(1) The Additional Franchise Fee and any other costs assessed by Franchisor against the Franchisee shall be paid monthly to Franchisor and shall commence as of the effective date of the Franchise. Franchisor shall be furnished at the time of each payment with a statement certified by the Franchisee's chief financial officer or an independent certified public accountant reflecting the total amount of monthly Net Profits for the payment period. Monthly payments shall be made to Franchisor no later than fifteen (15) days following the end of each month. An annual statement of Net Profits shall be furnished to Franchisor by an independent, certified public accountant. The Franchisee shall provide an annual complete audit statement for each calendar year within ninety (90) days from the end of that calendar year.

(2) In the event any franchise fee payment or recomputation amount is not made on or before the date specified herein, the Franchisee shall pay additional compensation and interest charges computed from such due date, at an annual rate equal to the commercial prime interest rate of Franchisor's

primary depository bank during the period such unpaid amount is owed.

(f) *Audit.*

(1) Franchisor shall have the right to inspect and copy records and the rights to audit and to recompute any amounts determined to be payable under this Agreement, whether the records are held by the Franchisee, an Affiliate, or any other entity that collects or receives funds related to the Franchisee's operation in Franchisor, including, by way of illustration and not limitation, any entity that sells advertising on the Franchisee's behalf. The Franchisee shall be responsible for providing the records to Franchisor, without regard to what entity holds the records. The records shall be maintained for at least three (3) years after the termination of the Franchise, including any renewal term. Franchisor's audit expenses shall be borne by Franchisor unless the audit discloses an underpayment, in which case the costs of the audit shall be borne by the Franchisee as a cost incidental to the enforcement of the Franchise. Any additional amounts due to Franchisor as a result of the audit shall be paid within thirty (30) days following written notice to the Franchisee by Franchisor of the underpayment, which notice shall include a copy of the audit report. If recomputation results in additional revenue to be paid to Franchisor, such amount shall be subject to a 10 percent (10%) interest charge.

(2) The Franchisee shall maintain its fiscal and financial records and have all relevant fiscal and financial records maintained by others on its behalf in such a manner as to enable Franchisor to determine Net Profits.

**COMPENSATION OPTION IV:**

(d) *Additional Franchise Fee.*

As additional consideration for the Franchisee's use of the Public Rights-of-Way, in recognition that the Franchise constitutes a valuable and exclusive property right without which the Franchisee would be required to invest substantial additional capital, the Franchisee shall pay Franchisor an Additional Franchise Fee of five percent (5%) of its Gross Revenues.<sup>37</sup>

(e) *Not a Tax or in Lieu of Any Other Tax or Fee.*

(1) Payment of the Additional Franchise Fee shall not be considered in the nature of a tax.

(2) The Additional Franchise Fee is in addition to all other taxes and payments that the Franchisee may be required to pay under any federal, state, or local law.

(f) *Payments.*

(1) The Additional Franchise Fee and any other costs assessed by Franchisor against the Franchisee shall be paid

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<sup>37</sup> ***Compensation Option IV calls for a fee based on the Franchisee's Gross Revenues. The figure of 5% used in the draft can be adjusted to reflect the proportion between cost reimbursement and profit that the parties intend the Franchisor to receive over the term of the Franchise. This option most accurately captures the value of the use of the PublicRights-of-Way to the Franchisee and treats that right as an expense of doing business.***

monthly to Franchisor and shall commence as of the effective date of the Franchise. Franchisor shall be furnished at the time of each payment with a statement certified by the Franchisee's chief financial officer or an independent certified public accountant reflecting the total amount of monthly Gross Revenues for the payment period. Monthly payments shall be made to Franchisor no later than fifteen (15) days following the end of each month. An annual statement of Gross Revenues shall be furnished to Franchisor by an independent, certified public accountant. The Franchisee shall provide an annual complete audit statement for each calendar year within ninety (90) days from the end of that calendar year.

(2) In the event any franchise fee payment or recomputation amount is not made on or before the date specified herein, the Franchisee shall pay additional compensation and interest charges computed from such due date, at an annual rate equal to the commercial prime interest rate of Franchisor's primary depository bank during the period such unpaid amount is owed.

(g) *Audit.*

(1) Franchisor shall have the right to inspect and copy records and the rights to audit and to recompute any amounts determined to be payable under this Agreement, whether the records are held by the Franchisee, an Affiliate, or any other entity that collects or receives funds related to the Franchisee's operation in Franchisor, including, by way of

illustration and not limitation, any entity that sells advertising on the Franchisee's behalf. The Franchisee shall be responsible for providing the records to Franchisor, without regard to what entity holds the records. The records shall be maintained for at least three (3) years after the termination of the Franchise, including any renewal term. Franchisor's audit expenses shall be borne by Franchisor unless the audit discloses an underpayment, in which case the costs of the audit shall be borne by the Franchisee as a cost incidental to the enforcement of the Franchise. Any additional amounts due to Franchisor as a result of the audit shall be paid within thirty (30) days following written notice to the Franchisee by Franchisor of the underpayment, which notice shall include a copy of the audit report. If recomputation results in additional revenue to be paid to Franchisor, such amount shall be subject to a 10 percent (10%) interest charge.

(2) The Franchisee shall maintain its fiscal and financial records and have all relevant fiscal and financial records maintained by others on its behalf in such a manner as to enable Franchisor to determine Gross Revenues.

#### 4. Design and Construction Provisions

(a) *System Design and Construction Plan.*<sup>38</sup>

(1) No later than sixty (60) days after the effective date of the Franchise, the Franchisee shall deliver to Franchisor a final system design and construction plan and budget (the "Construction Plan") substantially in the form attached as Exhibit A, and conforming with the procedures and standards set forth in the remainder of this Section 4.<sup>39</sup> The system design will be shown on maps of industry standard scale using standard symbology, and shall depict all electronic and physical features of the plant. Franchisor shall review the plan and, within sixty (60) days of the date the plan is made available for City review, submit comments to the Franchisee. Within fifteen (15) days of receipt of the comments, the Franchisee shall submit a revised plan to Franchisor, either incorporating the comments or

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<sup>38</sup> *As drafted, this section assumes that the Franchisee will design the system. In practice, the Franchisor may prefer to perform that function, and may even have a design ready before the franchise is granted. In that case, a separate section should be inserted to that effect, either attaching the design plan as an exhibit, or specifying when the system design will be completed and delivered to the Franchisee for preparation of the Construction Plan. This section should then be revised to make it clear that it refers only to the construction phase.*

<sup>39</sup> *Note that the provisions of Section 4 are the equivalent of a contract to design and build the System. The model sets forth basic standards to be met and issues that must be addressed, and contemplates that the Construction Plan and any separate system design will contain the specific technical characteristics of the System and detailed procedures to be followed. See Exhibit A for a description of some of the issues that might be incorporated in a Construction Plan. Note that the provisions set forth in the main text of the model could also be moved to or repeated in the exhibit.*

explaining why the comments were not included. Franchisor may take any appropriate action it is entitled to take under this Franchise Agreement or applicable law, including revocation, if it believes the Construction Plan fails to satisfy or is likely to fail to satisfy the Franchisee's obligations, including the obligation to construct an ATMS System capable of accommodating the present and reasonably foreseeable future traffic management needs of Franchisor. Franchisor's review does not excuse any non-performance under this Franchise Agreement or applicable law.

(2) Franchisor and Franchisee shall jointly take those actions required to ensure that (i) the ATMS System is included in the relevant Transportation Improvement Programs, (ii) the ATMS System has been addressed by the relevant long range transportation plans, and (iii) the ATMS System is determined to conform to the state implementation plan for achieving and maintaining national ambient air quality standards. The Construction Plan shall establish the respective responsibilities of the parties regarding how these tasks are to be accomplished.

(3) The Construction Plan shall include plans, specifications and engineering details for the physical plant, electronics and telecommunications, and all information necessary to obtain the necessary permits and licenses for construction and operation of the System, including satisfaction of environmental laws and regulations.

(b) *System Construction Schedule.*

The Construction Plan shall include a detailed schedule for the construction of the ATMS System, and shall provide that the Franchisee shall begin construction of the System within four (4) months of the effective date of the Franchise, and shall complete construction within twenty-four (24) months of the effective date.

(c) *Compliance with Construction Plan.*

Failure on the part of a Franchisee to commence and diligently pursue each of the requirements and complete each of the matters set forth in this Agreement or to comply with the Construction Plan, including by providing the equipment specified therein (or its equivalent) and by following the construction and installation practices required by this Agreement, including the Construction Plan, (except insofar as those plans or practices, if carried out, would result in construction of a system that could not meet requirements of federal, state or local law; and except for such minor modifications as are typical in the industry), shall be grounds for termination of the Franchise under and pursuant to the terms of Section 9. Notwithstanding the foregoing, however, the Governing Body in its discretion may extend the time for the completion of construction and installation for additional periods in the event a Franchisee, acting in good faith, experiences delays by reason of circumstances beyond its control. The Franchisee's failure to comply with provisions of the construction plan approved by the

Governing Body shall be subject to penalties pursuant to Section 9.

(d) *Construction Procedures.*

(1) The Franchisee shall construct, operate and maintain the ATMS System subject to the supervision of all of the authorities of Franchisor who have jurisdiction in such matters, and in strict compliance with all laws, ordinances, departmental rules and regulations affecting the System.

(2) The System, and all parts thereof, shall be subject to the right of periodic inspection by Franchisor.

(3) No construction, reconstruction or relocation of the System or any part thereof within the Public Rights-of-Way shall be commenced until written permits have been obtained from the proper City officials. In any permit so issued, such officials may impose such conditions and regulations as a condition of the granting of the permit as are necessary for the purpose of protecting any structures in the Public Rights-of-Way and for the proper restoration of such Public Rights-of-Way and structures, and for the protection of the public and the continuity of pedestrian and vehicular traffic.

(4) The Governing Body may, from time to time, issue such reasonable rules and regulations concerning the construction, operation and maintenance of the System as are consistent with the provisions of this Franchise Agreement.

(e) Construction Standards.<sup>40</sup>

(1) The construction, operation, maintenance, and repair of the ATMS System shall be in accordance with all applicable sections of the Occupational Safety and Health Act of 1970, as amended, the Intermodal Surface Transportation Efficiency Act, the National Electrical Safety Code, the National Electric Code, Obstruction Marking and Lighting, AC 70/7460 i.e., Federal Aviation Administration; Construction, Marking and Lighting of Antenna Structures, Federal Communications Commission Rules Part 17; **[Insert references to applicable transportation-related codes]**; AT&T Manual of Construction Procedures (Blue Book); Franchisor's Utility Construction Requirements; the Franchisee's Construction Procedures Manual; and all other applicable federal, state, or local laws and regulations that may apply to the operation, construction, maintenance, or repair of an ATMS System, including, without limitation, all applicable FCC rules and local zoning and construction codes, and laws and accepted industry practices, all as hereafter may be amended or adopted. In the event of a conflict among codes and standards,

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<sup>40</sup> **Note that there may be legal issues surrounding the Franchisor's power to establish the standards in this section, if they infringe on the authority of local governments to regulate the matters with which they are concerned.**

**In addition, one or more of the standards listed may not be desirable in a particular area. Although most jurisdictions will want to apply national standards to ensure compatibility and competition any vendors, a particular jurisdiction may have reasons for preferring a proprietary standard. Likewise, a jurisdiction may prefer to use a closed architecture rather than an open one.**

the most stringent code or standard shall apply (except insofar as those standard, if followed, would result in a system that could not meet requirements of federal, state or local law). Franchisor may adopt additional standards as required to ensure that work continues to be performed in an orderly and workmanlike manner, or to reflect changes in standards which may occur over the franchise term.

(2) All wires, cables, equipment, and structures shall be installed and located to cause minimum interference with the rights and convenience of property owners.

(3) All installation of electronic equipment shall be of a permanent nature, using durable components.

(4) Without limiting the foregoing, antennae and their supporting structures (towers) shall be designed in accordance with the Uniform Building Code as amended, and shall be painted, lighted, erected, and maintained in accordance with all applicable rules and regulations of the Federal Aviation Administration and all other applicable state or local laws, codes, and regulations, all as hereafter may be amended or adopted.

(5) Without limiting the foregoing, all of the Franchisee's plant and equipment, including, but not limited to, control centers, antenna and beacon sites, sensing devices, distribution system, towers, structures, poles, wires, cable, coaxial cable, fiber optic cable, fixtures, and apparatuses shall be installed, located, erected, constructed, reconstructed,

replaced, removed, repaired, maintained, and operated in accordance with good engineering practices, performed by experienced and properly trained maintenance and construction personnel so as not to endanger or interfere with improvements Franchisor shall deem appropriate to make or to interfere in any manner with the Public Rights-of-Way or legal rights of any property owner or to unnecessarily hinder or obstruct pedestrian or vehicular traffic.

(6) All safety practices required by law shall be used during construction, maintenance, and repair of an ATMS System. The Franchisee shall at all times employ ordinary care and shall install and maintain in use commonly accepted methods and devices preventing failures and accidents that are likely to cause damage, injury, or nuisance to the public.

(7) The Franchisee shall not place facilities, equipment, or fixtures where they will interfere with any gas, electric, telephone, water, sewer, cable television or other utility facilities, or obstruct or hinder in any manner the various utilities serving the residents of Franchisor of their use of any Public Rights-of-Way.

(8) Any and all Public Rights-of-Way, public property, or private property that is disturbed or damaged during the construction, repair, replacement, relocation, operation, maintenance, or construction of a System shall be promptly repaired by the Franchisee.

(9) The Franchisee shall, by a time specified by Franchisor, protect, support, temporarily disconnect, relocate, or remove any of its property when required by Franchisor by reason of traffic conditions; public safety; Public Right-of-Way construction; Public Right-of Way maintenance or repair (including resurfacing or widening); change of Public Right-of-Way grade; construction, installation or repair of sewers, drains, water pipes, power lines, signal lines, tracks, or any other type of government-owned communications system, public work or improvement or any government-owned utility; Public-Right-of-Way vacation; or for any other purpose where the convenience of Franchisor would be served thereby; provided, however, that the Franchisee shall, in all such cases, have the privilege of abandoning any property in place.

(10) If any removal, relaying, or relocation is required to accommodate the construction, operation, or repair of the facilities of another Person that is authorized to use the Public Rights-of-Way, the Franchisee shall, after thirty (30) days' advance written notice, take action to effect the necessary changes requested by the responsible entity. Franchisor may resolve disputes as to responsibility for costs associated with the removal, relaying, or relocation of facilities as among entities authorized to install facilities in the Public Rights-of-Way if the parties are unable to do so themselves, and if the matter is not governed by a valid contract between the parties or a state or federal law or regulation.

(11) In the event of an emergency, or where the ATMS System creates or is contributing to an imminent danger to health, safety, or property, Franchisor may remove, relay, or relocate any or all parts of the ATMS System without prior notice.

(12) The Franchisee shall, on the request of any Person holding a building moving permit issued by Franchisor, temporarily raise or lower its wires to permit the moving of buildings. The expense of such temporary removal or raising or lowering of wires shall be paid by the Person requesting same, and the Franchisee shall have the authority to require such payment in advance, except in the case where the requesting Person is Franchisor, in which case no such payment shall be required. The Franchisee shall be given not less than forty-eight (48) hours' advance notice to arrange for such temporary wire changes.

(13) The Franchisee shall have the authority to trim trees that overhang a Public Right-of-Way of Franchisor so as to prevent the branches of such trees from coming in contact with the wires and cables of the Franchisee. At the option of Franchisor, such trimming may be done by it or under the supervision, direction, and expense of the Franchisee.

(14) The Franchisee shall use, with the owner's permission, existing underground conduits or overhead utility facilities whenever feasible and may not erect poles in Public Rights-of-Way without the express permission of Franchisor.

Copies of agreements for use of conduits or other facilities shall be filed with Franchisor as required by this Franchise Agreement or upon City request.

(15) Cable may be installed overhead where poles now exist and electric or telephone lines or both are now overhead, but where no overhead poles exist all trunk, feeder and drop cable shall be constructed underground. Whenever and wherever electric lines and telephone lines are moved from overhead to underground placement, all ATMS System cables shall be similarly moved and the cost of movement of its cable shall be solely the obligation of the Franchisee.

(16) Franchisor shall have the right to install and maintain free of charge upon any poles owned by the Franchisee any wire and pole fixtures that do not unreasonably interfere with the ATMS System operations of the Franchisee.

(17) Prior to erection of any towers, poles, or conduits or the construction, upgrade, or rebuild of the System, the Franchisee shall first submit to Franchisor and other designated parties for approval a concise description of the ATMS System proposed to be erected or installed, including engineering drawings, if required by Franchisor, together with a map and plans indicating the proposed location of all such facilities. No erection or installation of any tower, pole, underground conduit, or fixture or any rebuilding or upgrading of the ATMS System shall be commenced by any Person until approval therefor has been received from Franchisor.

(18) Any contractor or subcontractor used for work or construction, installation, operation, maintenance, or repair of System equipment must be properly licensed under laws of the State and all applicable local ordinances, and each contractor or subcontractor shall have the same obligations with respect to its work as Franchisee would have under this Franchise Agreement and applicable laws if the work were performed by Franchisee. The Franchisee must ensure that contractors, subcontractors and all employees who will perform work for it are trained and experienced. The Franchisee shall be responsible for ensuring that the work of contractors and subcontractors is performed consistent with the franchise and applicable law, shall be fully responsible for all acts or omissions of contractors or subcontractors, shall be responsible for promptly correcting acts or omissions by any contractor or subcontractor, and shall implement a quality control program to ensure that the work is properly performed.

(f) *Area Served.*

The Franchisee shall build its system so that it is able to provide service to all areas located within the franchise area defined in Section 2(b) as existed on the effective date of the Franchise. It must build the system so that it can extend service to all areas that may be annexed in the future.

(g) *System **Tests** and Inspections.*

(1) Tests. The Franchisee shall perform all tests necessary to demonstrate compliance with the requirements of the franchise and other performance standards established by law or regulation. The Franchisee shall perform at least the following tests:

(A) Preconstruction quality control on cable and equipment. The Franchisee shall perform preconstruction quality tests on system components. In case of passive components, this will include testing a significant sample of devices to verify compliance with manufacturer's specifications. No component shall be used in system which fails to meet manufacturer's specifications. The Franchisee shall maintain in Franchisor records of all preconstruction tests, which Franchisor may inspect on reasonable notice.

(B) Acceptance Tests. The Franchisee shall perform acceptance tests on each construction area segment prior to subscriber connection. The tests shall demonstrate that the system components are operating as expected. Franchisor has the option of witnessing the tests. The test results shall be submitted to Franchisor for review. The Franchisee shall have the obligation, without further notice from City, to take corrective action if any segment is not operating as expected. Franchisor will review the tests and approve each system segment for service activation. Unless Franchisor determines test results are not adequate to demonstrate system compliance with

the standards described above and objects within three (3) working days of receipt of the tests, a segment will be deemed approved for service activation.

(2) Inspections during Construction. Franchisor may conduct inspections of construction areas and subscriber installations, including to assess compliance with the construction and installation practices manual and design plans. The Franchisee shall be notified of any violations found during course of inspections. The Franchisee must bring violations into compliance within 30 days of the date notice of violation is given, and must submit a report to Franchisor describing the steps taken to bring itself into compliance. Inspection does not relieve the Franchisee of its obligation to build in compliance with all provisions of the franchise.

(h) *Use of Public Property.*

(1) Should the grades or lines of the Public Rights-of-Way which the Franchisee is hereby authorized to use and occupy be changed at any time during the term of the Franchise, the Franchisee shall, if necessary, at its own cost and expense, relocate or change its System so as to conform with the new grades or lines.

(2) Any alteration to the water mains, sewerage or drainage system or to any City, state or other public structures in the Public Rights-of-Way required on account of the presence of the System in the Public Rights-of-Way shall be made at the sole cost and expense of the Franchisee. During any work of

constructing, operating or maintaining of the System, the Franchisee shall also, at its own cost and expense, protect any and all existing structures belonging to Franchisor and any other person. All work performed by the Franchisee pursuant to this section shall be done in the manner prescribed by Franchisor or other officials having jurisdiction therein.

(i) *Interference with Public Projects.*

Nothing in this Ordinance shall be in preference or hindrance to the right of Franchisor and any board, authority, commission or public service corporation to perform or carry on any public works or public improvements of any description, and should the System in any way interfere with the construction, maintenance or repair of such public works or public improvements, the Franchisee shall, [at its own cost and expense,]<sup>41</sup> protect or relocate the System, or part thereof, as reasonably directed by any City official, board, authority, commission or public service corporation.

(j) *Publicizing Proposed Construction Work.*

The Franchisee shall publicize proposed construction work at least one (1) week prior to commencement of that work by causing written notice of such construction work to be delivered to

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<sup>41</sup> ***This clause should probably be deleted under those modules in which the Franchisor will be responsible for the costs of construction and maintenance. If those costs are to be borne by the Franchisee, however, the burden of interfering with other public improvements should be on the Franchisee, since they will probably be receiving substantial benefit from the grant of an exclusive monopoly to operate in the right-of-way in the public interest.***

Franchisor and by notifying those Persons most likely to be affected by the work in at least two (2) of the following ways: by telephone, in person, by mail, by distribution of flyers to residences, by publication in local newspapers, or in any other manner reasonably calculated to provide adequate notice. In addition, before entering onto any Person's property, the Franchisee shall contact the property owner or (in the case of residential property) the resident at least one (1) day in advance. If the Franchisee must enter premises, it must schedule an appointment at the convenience of the owner or resident.

## **5. Operations and Maintenance**

### *(a) Annual Operations Plan.<sup>42</sup>*

No later than September 30 of each year, Franchisor and the Franchisee shall jointly develop an Annual Operations Plan for the next calendar year, in the form attached as Exhibit B. The Annual Operations Plan shall specify procedures to be followed by the Franchisee in operating the System, procedures for coordinating the activities of the Franchisee and the operations of the system with Franchisor [Department of Public Works or equivalent] and other responsible City departments, and shall address the other matters outlined in Exhibit B.

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<sup>42</sup> ***As with the Construction Plan, the model sets forth basic operational and maintenance standards to be met and issues that must be addressed, and contemplates that the Annual Operations Plan and Budget will contain the specific technical requirements and detailed procedures to be followed. See Exhibit B for a description of some of the issues that might be incorporated in an Operations Plan. Note that the provisions set forth in the main text of the model could also be moved to or repeated in the exhibit.***

**THIS VERSION OF SECTION 5(b) APPLIES TO MODULES A THROUGH C:**

*(b) Annual Operating Budget.*

No later than September 30 of each year, the Franchisee and Franchisor shall jointly prepare an Annual Operating Budget for the next calendar year, in the form attached as Exhibit C. Each Annual Operating Budget shall show all projected costs of operating and maintaining the System for the year, all projected revenues arising from operation of the System, the disposition of all projected revenues, and a schedule of payments, if any, from Franchisor to the Franchisee and/or from the Franchisee to Franchisor.

**THIS VERSION OF SECTION 5(b) APPLIES TO MODULES D AND E:**

*(b) Annual Operating Budget.*

No later than September 30 of each year, the Franchisee shall deliver to Franchisor an Annual Operating Budget for the next calendar year, in the form attached as Exhibit C. Each Annual Operating Budget shall show all projected costs of operating and maintaining the System for the year, all projected revenues arising from operation of the System, and the disposition of all projected revenues.

*(c) System Maintenance.*

*(1) Maintenance Practices Subject to Regulation.*

Franchisor shall review maintenance practices at regular intervals and may waive requirements or adopt additional requirements as reasonable to ensure the System remains capable of providing high-quality service.

(2) Maintenance Practices. In addition to its other obligations, the Franchisee shall (A) use replacement components of good and durable quality, with characteristics better or equal to replaced equipment; and (B) follow the more stringent of franchise maintenance standards, industry maintenance standards or corporate maintenance standards.

(d) *Technical Standards.*

(1) Any ATMS System within Franchisor shall meet or exceed all applicable technical standards, including any such standards as hereafter may be amended or adopted by Franchisor in a manner consistent with federal, state and local law.<sup>43</sup>

(2) The Franchisee shall use equipment generally used in high-quality, reliable, modern systems of similar design, including, but not limited to, back-up power supplies capable of providing power to the System for a minimum of twenty-four (24) hours in the event of an electrical outage. This obligation shall include the obligation to install equipment that will (A) cut in automatically on failure of commercial utility AC power, (B) revert automatically to commercial power when it is restored, (C) prevent the standby power source from powering a "dead" utility line, and (D) alert the Franchisee's staff when the backup power supply cuts in.

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<sup>43</sup> ***As noted above, most jurisdictions will want to apply national standards to ensure compatibility and competition any vendors, but a particular jurisdiction may have reasons for preferring a proprietary standard. Likewise, a jurisdiction may prefer to use a closed architecture rather than an open one.***

(3) The Franchisee shall not design, install, or operate its facilities in a manner that will interfere with the signals of any broadcast station, the facilities of any public utility or cable system, or individual or master antennae used for receiving television or other broadcast signals.

(e) Tests.

(1) Proof of Performance Tests.

At least bi-annually or as required by FCC rules, the Franchisee shall perform proof of performance tests, designed to demonstrate compliance with this Section and FCC requirements. The Franchisee shall provide the proof of performance test results promptly to Franchisor. The Franchisee shall provide Franchisor ten (10) days' advance written notice when a proof of performance or other required test is scheduled so that Franchisor may have an observer present. Franchisor shall have the right to inspect the ATMS System during and after its construction to ensure compliance with this Section and applicable provisions of local, state and federal law, and may require the Franchisee to perform additional tests based on Franchisor's investigation of ATMS System performance or on Subscriber complaints.

(2) Continuing Tests.

(A) The Franchisee and Franchisor will jointly select locations at the extremities of system service area to install equipment to establish permanent test points. The test points shall be installed in locked enclosures so as to be

accessible from ground level. The Franchisee shall perform proof of performance tests at these locations at least once every six months through life of franchise except as federal law otherwise limits its obligation, and at other points where system user complaints indicate tests are warranted. The tests shall demonstrate system compliance with technical specifications established pursuant to franchise, or other applicable law. Franchisor shall have option of witnessing the tests. The number of required test points may be specified by Franchisor in accordance with federal law and with good engineering practice, as appropriate to ensure all subscribers are receiving adequate service.

(B) A written report of test results shall be filed with Franchisor within seven (7) days of each test. If the location fails to meet performance specifications, the Franchisee, without requirement of additional notice or request from City, shall take corrective action, retest the locations and advise Franchisor of the action taken and results achieved.

(f) *Continuity of Service.*

At Franchisor's request, the Franchisee shall operate its System for a temporary period (the "transition period") following the termination, Sale, or Transfer of its Franchise as necessary to maintain service, and shall cooperate with Franchisor to assure an orderly transition from it to another Franchisee. The transition period shall be no longer than the reasonable period required to select another Franchisee and build

a replacement System, and shall not be longer than thirty-six (36) months, unless extended by Franchisor for good cause.

During the transition period, the Franchisee will continue to be obligated to comply with the terms and conditions of the Franchise Agreement and applicable laws and regulations.

(3) If the Franchisee abandons its System during the Franchise term, or fails to operate its System in accordance with the terms of this Section 5(f) during any Transition Period, Franchisor, at its option, may operate the System, designate another entity to operate the System temporarily until the Franchisee restores service under conditions acceptable to Franchisor or until the Franchise is revoked and a new Franchisee selected by Franchisor is providing service, or obtain an injunction requiring the Franchisee to continue operations. If Franchisor is required to operate or designate another entity to operate the ATMS System, the Franchisee shall reimburse Franchisor or its designee for all reasonable costs and damages incurred that are in excess of the revenues from the ATMS System.

(4) Franchisor shall be entitled to injunctive relief under the preceding paragraph if:

(A) The Franchisee fails to provide ATMS Service in accordance with its Franchise over a substantial portion of the Franchise Area for \_\_\_\_\_ (\_\_) consecutive hours, unless Franchisor authorizes a longer interruption of service; or

(B) The Franchisee, for any period, willfully and without cause refuses to provide ATMS Service in accordance with its Franchise over a substantial portion of the Franchise Area.

(g) *Interconnection and Interoperability.*

(1) The Franchisee shall design the System so that it may be interconnected with any or all other ATMS systems or similar traffic management systems in the area. Interconnection of systems may be made by direct cable connection, microwave link, satellite or other appropriate methods.

(2) The Franchisee shall design the System so that it meets national interoperability standards for ITS user equipment, and shall update the System as required to maintain compliance with those standards.

(3) Upon receiving the directive of Franchisor to interconnect, the Franchisee shall immediately initiate negotiations with the other affected system or systems so that costs may be shared equally for both construction and operation of the interconnection link.

(4) The Governing Body may grant reasonable extensions of time to interconnect or rescind its request to interconnect upon petition by the Franchisee to the Governing Body. The Governing Body shall grant the request if it finds that the Franchisee has negotiated in good faith and the cost of interconnection would cause an unreasonable increase in Subscriber rates.

(5) No interconnection shall take place without prior approval of the Governing Body. The Franchisee in seeking approval for interconnection shall demonstrate that all signals to be interconnected will comply with FCC technical standards for all classes of signals and will result in no more than a low level of distortion.

(6) The Franchisee shall cooperate with any interconnection corporation, regional interconnection or transportation authority, or state or federal regulatory agency which may be hereafter established for the purpose of regulating, facilitating, financing or otherwise providing for the interconnection of ATMS or other communications systems beyond the boundaries of Franchisor.

(h) *Integration of Advancements in Technology.*

(1) It is the responsibility of the Franchisee to periodically upgrade its ATMS System to integrate advancements in technology as may be required to meet the needs and interests of the community in light of the costs thereof.

(2) To ensure that the Franchisee is carrying out its responsibilities hereunder, the Franchisee shall be required to submit a report on ATMS technology to Franchisor every odd-numbered year during the Franchise term. Each report shall describe developments in ATMS and related technologies, and whether, how, and by what date the Franchisee plans to incorporate those technological developments into the System. The report also shall describe how other ATMS providers have

incorporated or are planning to incorporate the technological developments into their Systems and the estimated timetable for doing so. Franchisor, on receipt of each plan, promptly shall schedule hearings to consider whether the Franchisee's timetable for implementing the new technologies is adequate to meet the future needs and interests of Franchisor. If Franchisor considers the plan to be adequate, Franchisor shall adopt it and the Franchisee shall be bound to implement it as if it were set forth herein.

**MODULE A -- PURE PUBLIC GOOD:**

**6. System Facilities, Equipment, and Services**

**NOTE: If Service Options I or II apply, use the following provision:**

(a) *Provision of ATMS Service.*

After the ATMS System becomes operational in a portion of the Franchise Area, as provided in the Construction Plan, the Franchisee shall begin to provide ATMS Service in that area pursuant to the Annual Operations Plan.

**NOTE: If Service Option II applies, use the following provision:**

(b) *Provision of Basic ATIS Service.*

At the time specified in the Construction Plan and Annual Operation Plan, the Franchisee shall begin to provide Basic ATIS Service to all businesses, residents, and travellers in Franchisor, at no cost.

(c) *Provision of Other ITS Services and Ancillary Services.*

(1) The Franchisee may provide other ITS Services that do not require the installation of additional facilities or expansion of existing facilities in the Public Rights-of-Way, with the prior consent of Franchisor, and on such terms as the parties shall mutually agree.

(2) The Franchisee may provide Ancillary Services with the prior consent of Franchisor and on such terms as the parties shall mutually agree.

(d) *Delivery of ATMS Data to Franchisor at no Cost.*

The Franchisee shall deliver ATMS Service, ATIS Service, all other available ITS Services, and all data and other information collected, created, derived or developed by the Franchisee in the course of operating the System or providing ITS Services to Franchisor and designated departments and agencies, at no cost to Franchisor.

***NOTE: The following should be included if the Franchisee's system will include the capability for electronic toll collection:***

(e) *Electronic Toll Collection.*<sup>44</sup>

At the times and in the portions of the Public Rights-of-Way specified in the Construction Plan and Annual Operation Plan, the Franchisee shall begin operation of Electronic Toll Collection facilities.

(f) *Rights in Data.*<sup>45</sup>

Franchisor shall retain full title to and all rights in all data and other information collected, created, derived or developed by the Franchisee in the course of operating the System or providing ITS Services.

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<sup>44</sup> *The implementation of Electronic Toll Collection raises very important privacy considerations. The ability to track the movements of particular vehicles and the possession of financial information concerning system users imposes stringent confidentiality and information security obligations on the operator of an ATMS system. Many of these obligations are backed up by legal sanctions. Other legal obligations, such as compliance with federal regulations governing electronic fund transfers, also arise. Before an ATMS system incorporates Electronic Toll Collection, all these issues must be carefully considered. This draft does not address those issues because Electronic Toll Collection will probably not be part of most ATMS systems.*

<sup>45</sup> *In this module, Franchisor retains all rights in data because of the government's large financial contribution to the project. The principle behind the model is that the government will retain the right in data if public funds are required to ensure that the private sector earns a profit. Subject to state law requirements, this principle may be modified if required to provide the Franchisee additional incentives to develop new services.*

**MODULE B -- PARTIAL PUBLIC GOOD:**

**6. System Facilities, Equipment, and Services**

**NOTE: If Service Options XII, IV or V apply, use the following provision:**

(a) *Provision of ATMS Service.*

After the ATMS System becomes operational in a portion of the Franchise Area, as provided in the Construction Plan, the Franchisee shall begin to provide ATMS Service in that area pursuant to the Annual Operations Plan.

**NOTE: If Service Options XV or V apply, use the following provision:**

(b) *Provision of ATIS Service.*

At the time specified in the Construction Plan and the Annual Operation Plan, the Franchisee shall have the authority to provide ATIS Service to all businesses, residents, and travellers in Franchisor at the rates set in the Annual Operating Budget.

(c) *Provision of Other ITS Services and Ancillary Services.*

(1) The Franchisee may provide other ITS Services that do not require the installation of additional facilities or expansion of existing facilities in the Public Rights-of-Way, with the prior consent of Franchisor, and on such terms as the parties shall mutually agree.

(2) The Franchisee may provide Ancillary Services with the prior consent of Franchisor and on such terms as the parties shall mutually agree.

**NOTE: If Service Options III or V apply, use the following provision:**

(d) *Sale of ATMS Data.*

The Franchisee shall have the authority to sell data useful in the provision of ATIS Service and other ITS services to third parties that are not Affiliates of the Franchisee at negotiated rates.

(e) *Delivery of ATMS Data to Franchisor at no Cost.*

The Franchisee shall deliver ATMS Service, ATIS Service, all other available ITS Services, and all data and other information collected, created, derived or developed by the Franchisee in the course of operating the System or providing ITS Services to Franchisor and designated departments and agencies, at no cost to Franchisor.

**NOTE: The following should be included only if the Franchisee's system will include the capability for electronic toll collection:**

(f) *Electronic Toll Collection.*<sup>46</sup>

At the times and in the portions of the Public Rights-of-Way specified in the Construction Plan and Annual Operation Plan the Franchisee shall begin operation of Electronic Toll Collection facilities.

(g) *Rights in Data.*<sup>47</sup>

Franchisor shall retain full title to and all rights in all data and other information collected, created, derived or developed by the Franchisee in the course of operating the System or providing ITS Services.

**MODULE C -- PROJECT AT BREAK-EVEN:**

**6. System Facilities, Equipment, and Services**

**NOTE: If Service Options III, IV or V apply, use the following provision:**

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<sup>46</sup> *The implementation of Electronic Toll Collection raises very important privacy considerations. The ability to track the movements of particular vehicles and the possession of financial information concerning system users imposes stringent confidentiality and information security obligations on the operator of an ATMS system. Many of these obligations are backed up by legal sanctions. Other legal obligations, such as compliance with federal regulations governing electronic fund transfers, also arise. Before an ATMS system incorporates Electronic Toll Collection, all these issues must be carefully considered. This draft does not address those issues because Electronic Toll Collection will probably not be part of most ATMS systems.*

<sup>47</sup> *In this module, Franchisor retains all rights in data because of the government's large financial contribution to the project. The principle behind the model is that the government will retain the right in data if public funds are required to ensure that the private sector earns a profit. Subject to state law requirements, this principle may be modified if required to provide the Franchisee additional incentives to develop new services.*

(a) *Provision of ATMS Service.*

After the ATMS System becomes operational in a portion of the Franchise Area, as provided in the Construction Plan, the Franchisee shall begin to provide ATMS Service in that area pursuant to the Annual Operations Plan.

**NOTE: If Service options IV or V apply, use the following provision:**

(b) *Provision of ATIS Service.*

At the time specified in the Construction Plan and the Annual Operation Plan, the Franchisee shall have the authority to provide ATIS Service to all businesses, residents, and travellers in Franchisor at the rates set in the Annual Operating Budget.

(c) *Provision of Other ITS Services and Ancillary Services.*

(1) The Franchisee may provide other ITS Services that do not require the installation of additional facilities or expansion of existing facilities in the Public Rights-of-Way, with the prior consent of Franchisor, and on such terms as the parties shall mutually agree.

(2) The Franchisee may provide Ancillary Services with the prior consent of Franchisor and on such terms as the parties shall mutually agree.

**NOTE: If Service Options III or V apply, use the following provision:**

(d) *Sale of ATMS Data.*

The Franchisee shall have the authority to sell data useful in the provision of ATIS Service and other ITS services to third parties that are not Affiliates of the Franchisee at negotiated rates that are non-discriminatory and subject to City approval.

(e) *Delivery of ATMS Data to Franchisor at no Cost.*

The Franchisee shall deliver ATMS Service, ATIS Service, all other available ITS Services, and all data and other information collected, created, derived or developed by the Franchisee in the course of operating the System or providing ITS Services to Franchisor and designated departments and agencies, at no cost to Franchisor.

**NOTE: The following should be included only if the Franchisee's system will include the capability for electronic toll collection:**

(f) *Electronic Toll Collection.*<sup>48</sup>

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<sup>48</sup> **The implementation of Electronic Toll Collection raises very important privacy considerations. The ability to track the movements of particular vehicles and the possession of financial information concerning system users imposes stringent confidentiality and information security obligations on the operator of an ATMS system. Many of these obligations are backed up by legal sanctions. Other legal obligations, such as compliance with federal regulations governing electronic fund transfers, also arise. Before an ATMS system incorporates Electronic Toll Collection, all these issues must be carefully considered. This draft does not address those issues because Electronic Toll Collection will probably not be part of most ATMS systems.**

At the times and in the portions of the Public Rights-of-Way specified in the Construction Plan and Annual Operation Plan the Franchisee shall begin operation of Electronic Toll Collection facilities.

(g) *Rights in Data.*<sup>49</sup>

Franchisor shall retain full title to and all rights in all data and other information collected, created, derived or developed by the Franchisee in the course of operating the System or providing ITS Services.

**MODULE D -- OPERATIONS PROFITABLE:**

**6. System Facilities, Equipment, and Services**

**NOTE: If Service Options III, IV or V apply, use the following provision:**

(a) *Provision of ATMS Service.*

After the ATMS System becomes operational in a portion of the Franchise Area, as provided in the Construction Plan, the Franchisee shall begin to provide ATMS Service in that area pursuant to the Annual Operations Plan.

**NOTE: If Service Options IV or V apply, use the following provision:**

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<sup>49</sup> *In this module, Franchisor retains all rights in data because of the government's large financial contribution to the project. The principle behind the model is that the government will retain the right in data if public funds are required to ensure that the private sector earns a profit. Subject to state law requirements, this principle may be modified if required to provide the Franchisee additional incentives to develop new services.*

(b) *Provision of ATIS Service.*

At the time specified in the Construction Plan and the Annual Operation Plan the Franchisee shall have the authority to provide ATIS Service to all businesses, residents, and travellers in Franchisor at reasonable rates, subject to the right of Franchisor to review and regulate such rates.

(c) *Provision of Other ITS Services and Ancillary Services.*

(1) The Franchisee may provide other ITS Services that do not require the installation of additional facilities or expansion of existing facilities in the Public Rights-of-Way, with the prior consent of Franchisor, and on such terms as the parties shall mutually agree.

(2) The Franchisee may provide Ancillary Services with the prior consent of Franchisor and on such terms as the parties shall mutually agree.

***NOTE: If Service Options III or V apply, use the following provision:***

(d) *Sale of ATMS Data.*

The Franchisee shall have the authority to sell data useful in the provision of ATIS Service and other ITS services to third parties that are not Affiliates of the Franchisee at negotiated rates that are non-discriminatory and subject to City approval.

(e) *Delivery of ATMS Data to Franchisor at no Cost.*

The Franchisee shall deliver ATMS Service, ATIS Service, all other available ITS Services, and all data and other information collected, created, derived or developed by the Franchisee in the

course of operating the System or providing ITS Services to Franchisor and designated departments and agencies, at no cost to Franchisor.

**NOTE: The following should be included only if the Franchisee's system will include the capability for electronic toll collection:**

(f) *Electronic Toll Collection.*"

At the times and in the portions of the Public Rights-of-Way specified in the Construction Plan and Annual Operation Plan the Franchisee shall begin operation of Electronic Toll Collection facilities.

(g) *Rights in Data.*<sup>51</sup>

The Franchisee shall retain full title to and all rights in all data and other information collected, created, derived or developed by the Franchisee in the course of operating the System or providing ITS Services.

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<sup>50</sup> **The implementation of Electronic Toll Collection raises very important privacy considerations. The ability to track the movements of particular vehicles and the possession of financial information concerning system users imposes stringent confidentiality and information security obligations on the operator of an ATMS system. Many of these obligations are backed up by legal sanctions. Other legal obligations, such as compliance with federal regulations governing electronic fund transfers, also arise. Before an ATMS system incorporates Electronic Toll Collection, all these issues must be carefully considered. This draft does not address those issues because Electronic Toll Collection will probably not be part of most ATMS systems.**

<sup>51</sup> **In this module, the Franchisee retains all rights in data (although it must make the data available to the Franchisor at no cost) because the project does not depend on public funding for the Franchise to earn a profit.**

**MODULE E -- PROJECT PROFITABLE:**

**6. System Facilities, Equipment, and Services**

**NOTE: If Service Options III, IV or V apply, use the following provision:**

(a) *Provision of ATMS Service.*

After the ATMS System becomes operational in a portion of the Franchise Area, as provided in the Construction Plan, the Franchisee shall begin to provide ATMS Service in that area pursuant to the Annual Operations Plan.

**NOTE: If Service Options IV or V apply, use the following provision:**

(b) *Provision of ATIS Service.*

At the time specified in the Construction Plan and the Annual Operation Plan the Franchisee shall have the authority to provide ATIS Service to all businesses, residents, and travellers in Franchisor at reasonable rates, subject to the right of Franchisor to review and regulate such rates.

(c) *Provision of Other ITS Services and Ancillary Services.*

(1) The Franchisee may provide other ITS Services that do not require the installation of additional facilities or expansion of existing facilities in the Public Rights-of-Way, with the prior consent of Franchisor, and on such terms as the parties shall mutually agree.

(2) The Franchisee may provide Ancillary Services with the prior consent of Franchisor and on such terms as the parties shall mutually agree.

**NOTE: If Service Options III or V apply, use the following provision:**

(d) *Sale of ATMS Data.*

The Franchisee shall have the authority to sell data useful in the provision of ATIS Service and other ITS services to third parties that are not Affiliates of the Franchisee at negotiated rates that are non-discriminatory and subject to City approval.

(e) *Provision of Facilities and Equipment.*

The Franchisee shall purchase and install, at no cost to the City, the additional traffic management and control equipment specified in Exhibit D. The Franchisee shall also periodically purchase and install such additional equipment as Franchisor may require to maintain its ability to monitor the operation of the ATMS System and take advantage of technological advances.

(f) *Delivery of ATMS Data to Franchisor at no Cost.*

The Franchisee shall deliver ATMS Service, ATIS Service, all other available ITS Services, and all data and other information collected, created, derived or developed by the Franchisee in the course of operating the System or providing ITS Services to Franchisor and designated departments and agencies, at no cost to Franchisor.

**NOTE: The following should be included only if the Franchisee's system will include the capability for electronic toll collection:**

(g) *Electronic Toll Collection.*<sup>52</sup>

At the times and in the portions of the Public Rights-of-Way specified in the Construction Plan and Annual Operation Plan the Franchisee shall begin operation of Electronic Toll Collection facilities.

(h) *Rights in Data.*<sup>53</sup>

Subject to subparagraph (f) hereof, the Franchisee shall retain full title to and all rights in all data and other information collected, created, derived or developed by the Franchisee in the course of operating the System or providing ITS Services.

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<sup>52</sup> *The implementation of Electronic Toll Collection raises very important privacy considerations. The ability to track the movements of particular vehicles and the possession of financial information concerning system users imposes stringent confidentiality and information security obligations on the operator of an ATMS system. Many of these obligations are backed up by legal sanctions. Other legal obligations, such as compliance with federal regulations governing electronic fund transfers, also arise. Before an ATMS system incorporates Electronic Toll Collection, all these issues must be carefully considered. This draft does not address those issues because Electronic Toll Collection will probably not be part of most ATMS systems.*

<sup>53</sup> *In this module, the Franchisee retains all rights in data (although it must make the data available to the Franchisor at no cost) because the project does not depend on public funding for the Franchisee to earn a profit.*

## 7. Recordkeeping and Reporting Provisions<sup>54</sup>

### (a) *Open Books and Records.*

(1) Franchisor shall have the right to inspect and copy at any time during normal business hours at the Franchisee's main office in the Franchise Area or at such location as Franchisor may designate, all of Franchisee's books and records of account, receipts, maps, plans, financial statements, contracts, service complaint logs, performance test results, records of requests for service, computer records, codes, programs, and disks or other storage media and other like material necessary to monitor compliance with the terms of this Franchise Agreement or applicable law. This includes not only the books and records of the Franchisee, but any relevant books and records Franchisor held by an Affiliate, an operator of the ATMS System, or any contractor, subcontractor or any person holding any form of management contract for the ATMS System. The

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<sup>54</sup> ***This Section imposes broad obligations on the Franchisee. Whether the public sector is funding the entire project or relying on private sector financing, the Franchisor has an obligation to closely monitor the Franchisee's activities because of its interests in protecting the public safety and managing the use of public property, The government cannot effectively manage its affairs if its private sector partner can refuse to disclose important information. For a true public-private partnership to develop, each party must have confidence in the other, and that confidence can only develop if the parties can deal openly with each other. Finally, government agencies have obligations to the public that cannot be met if important facts are left undisclosed. Viewed in that light, the obligations imposed by this Section are not unreasonable. On the other hand, if the parties already have good working relationships some of them may be dispensed with, always provided that the public sector will be able to meet its obligations to the public.***

Franchisee is responsible for collecting the information and producing it at Franchisee's office in Franchisor, and by accepting its franchise it affirms that it can and will do so.

(2) The Franchisee shall maintain separate financial records governing its operations in the Franchise Area.<sup>55</sup>

(3) Access to the Franchisee's records shall not be denied by the Franchisee on the basis that said records contain "proprietary" information. All such information received by Franchisor shall remain confidential insofar as permitted by the [Insert reference to state Freedom of Information Act or equivalent] and other applicable state and federal law.<sup>56</sup>

(4) The Franchisee shall maintain a file of records open to public inspection in accordance with applicable FCC rules and regulations.

(b) *Communication with Regulatory Agencies.*

The Franchisee shall file with Franchisor all reports required by state and federal agencies, including, but not

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<sup>55</sup> ***This requirement may be satisfied by establishing a separate subsidiary to hold the Franchise and manage the System.***

<sup>56</sup> ***This is a critical area that may require legislation to resolve. There is an inherent conflict between the private sector's legitimate desire to protect confidential proprietary information and the obligations imposed on government agencies by applicable freedom of information laws. There is no easy way to resolve this conflict, and many private sector entities may be dissuaded from participating in public-private partnerships for fear that competitors will gain access to trade secrets and sensitive financial information. On the other hand, as noted above, government agencies have an obligation to monitor the activities of entities with which they do business and this obligation is particularly important in the case of a long-term relationship with a direct effect on public safety,***

limited to, any proof of performance tests and results, Equal Employment Opportunity reports, and all petitions, applications, and communications of all types regarding the ATMS System, or a group of ATMS Systems of which the Franchisee's ATMS System is a part, submitted or received by the Franchisee, an Affiliate, or any other Person on the behalf of the Franchisee, either to or from the FHWA, the State Department of Transportation, the FCC, the Securities and Exchange Commission, or any other federal or state regulatory commission or agency having jurisdiction over any matter affecting operation of the Franchisee's System. This material shall be submitted to Franchisor at the time it is filed or within five (5) days of the date it is received.

*(c) Annual Reports.*

(1) No later than 90 days after the end of its fiscal year, the Franchisee shall submit a written report to the Governing Body, in a form directed by the Governing Body, which shall include:

(A) a summary of the previous year's activities in development of the ATMS System, including but not limited to descriptions of services begun or dropped;

(B) a summary of complaints, identifying both the number and nature of the complaints received and an explanation of their dispositions;

(C) An annual fully audited and certified financial report from the previous calendar year, including year-end balance sheet; income statement showing revenue from every

source, line item operating expenses, depreciation expense, interest expense, and taxes paid; statement of sources and applications of funds; and depreciation schedule.

(D) A current annual statement of all capital expenditures, including the cost of construction and of equipment.

(E) a projected income statement, balance sheet, statement of sources and applications of funds and statement of construction plans for the next two (2) years;

(F) a reconciliation between previously projected estimates and actual results;

(G) An ownership report, indicating all Persons who at any time during the preceding year did control or benefit from an interest in the Franchise of five percent (5%) or more;

(H) An annual list of officers and members of the Board of Directors of the Franchisee and any Affiliates;

(I) An organizational chart showing all corporations or partnerships with more than a five (5) percent interest ownership in the Franchisee, and the nature of that ownership interest (limited partner, general partner, preferred shareholder, etc.); and showing the same information for each corporation or partnership that holds such an interest in the corporations or partnerships so identified and so on until the ultimate corporate and partnership interests are identified;

(J) An annual report of each entity identified in subsection (I) of this Section which issues an annual report;

(K) A report on the System's technical tests and measurements; .

(L) such other information as Franchisor or the Governing Body may direct.

(2) The annual report shall be presented at a regular public meeting of the Governing Body to be held no earlier than 10 days following submission of the report.

(d) *Annual Plant Survey Report.*

The Franchisee shall prepare and submit, by [August 31] of each year, a complete survey of its plant and a full report thereon to the Governing Body. The purpose of the report shall be to assure Franchisor that the technical standards of the Franchise are being maintained. This plant survey shall include the physical miles of plant construction and plant in operation during the fiscal year, including any revisions to the System "as built" maps filed with Franchisor, and appropriate electronic measurements and shall be conducted in conformance with such requirements, including supervision, as the Governing Body may devise.

(e) *Special Reports.*

Franchisee shall deliver the following special reports:

(1) The Franchisee shall submit monthly construction reports to Franchisor after the Franchise is awarded for any construction undertaken during the term of the Franchise until such construction is complete, including any rebuild that may be specified in the Franchise. The Franchisee must submit updated

as-built system design maps to City within 30 days of the completion of system construction in any geographic area. The maps shall be developed on the basis of post-construction inspection by the Franchisee and construction personnel to assess compliance with system design. Any departures from design must be indicated on the as-built maps, to assist Franchisor in assessing operator compliance with its obligations under franchise.

(2) Any notice of deficiency, forfeiture, or other document issued by any state or federal agency instituting any investigation or civil or criminal proceeding regarding the ATMS System, the Franchisee, or any Affiliate of the Franchisee, to the extent the same may affect or bear on operations in Franchisor. This material shall be submitted to Franchisor at the time it is filed or within five (5) days of the date it is received.

(3) Any request for protection under bankruptcy laws, or any judgment related to a declaration of bankruptcy by the Franchisee or by any partnership or corporation that owns or controls the Franchisee directly or indirectly. This material shall be submitted to Franchisor at the time it is filed or within five (5) days of the date it is received.

(4) Technical tests required by Franchisor as specified in this Franchise Agreement or any applicable ordinance shall be submitted to Franchisor promptly upon completion of such tests.

(5) A report submitted within thirty (30) days of the end of each calendar quarter showing the number of outages and service degradations for the prior quarter, and identifying separately each planned outage, the time it occurred, its duration, and the estimated area affected; each unplanned outage or service degradation, the time it occurred, its estimated duration and the estimated area affected; and the total hours of outages and service degradations as a percentage of total hours of ATMS System operation.

(f) *General Reports.*

Each Franchisee shall prepare and furnish to Franchisor, at the times and in the form prescribed by the Governing Body, such reports with respect to its operation, affairs, transactions or property, as may be reasonably necessary or appropriate to the performance of any of the rights, functions or duties of Franchisor in connection with this Agreement.

(g) *Records Required.*

(1) The Franchisee shall at all times maintain:

(A) A full and complete set of plans, records, and "as built" maps showing the exact location of all System equipment installed or in use in Franchisor.

(B) A comprehensive record of all personnel transactions and utilization of contractors, subcontractors, vendors, and suppliers by race and sex.

(c) Records of outages, indicating date, duration, and area affected, type of outage, and cause.

(D) Records of service calls for repair and maintenance.

(E) A public file showing its plan and timetable for construction of the ATMS System.

(2) Franchisor may require additional information, records, and documents from time to time.

(h) *Performance Evaluation.*

(1) Franchisor may, at its discretion, hold performance evaluation sessions. All such evaluation sessions shall be open to the public, and announced in a newspaper of general circulation.

(2) Topics that may be discussed at any evaluation session may include, but are not limited to, system performance and construction, Franchisee compliance with this Franchise Agreement, services provided, franchise fees, penalties, free or discounted services, applications of new technologies, and judicial and administrative filings.

(3) During the review and evaluation by Franchisor, the Franchisee shall fully cooperate with Franchisor and shall provide such information and documents as Franchisor may need to reasonably perform its review.

(i) *Voluminous Materials.*

If any books, records, maps or plans, or other requested documents are too voluminous, or for security reasons cannot be copied and moved, then the Franchisee may request that the inspection take place at some other location, provided that (1)

the Franchisee must make necessary arrangements for copying documents selected by Franchisor after review; and (2) the Franchisee must pay all travel and additional copying expenses incurred by Franchisor in inspecting those documents or having those documents inspected by its designee.

(j) *Retention of Records; Relation to Privacy Rights.*

The Franchisee shall take all steps required, if any, to ensure that it is able to provide Franchisor all information which must be provided or may be requested under this Franchise Agreement. Each Franchisee shall be responsible for redacting any data that federal or state law prevents it from providing to Franchisor. Records shall be kept for at least five (5) years.

**8. Insurance; Surety; Indemnification**

(a) *Insurance Required.*

The Franchisee shall maintain, and by its acceptance of a Franchise specifically agrees that it will maintain, throughout the entire length of the Franchise period, at least the following liability insurance coverage insuring Franchisor and the Franchisee: worker's compensation and employer liability insurance to meet all requirements of state law and comprehensive general liability insurance with respect to the construction, operation, and maintenance of the ATMS System, and the conduct of the Franchisee's business in Franchisor, in the minimum amounts of:

(1) [\$1,000,000] for property damage resulting from any one accident;

(2) [\$5,000,000] for personal bodily injury or death resulting from any one accident; and

(3) [\$2,000,000] for all other types of liability.

Franchisor may review these amounts no more than once a year and may require reasonable adjustments to them consistent with the public interest. In the event that the Franchisee objects to an increase in a policy limit and the parties are unable to agree on a mutually acceptable amount, the dispute shall be resolved by arbitration in accordance with the procedures of the American Arbitration Association.

*(b) Qualifications of Sureties.*

All insurance policies shall be with sureties qualified to do business in the State of \_\_\_\_\_ with an A-1 or better rating of insurance by Best's Key Rating Guide, Property/Casualty Edition, and in a form approved by Franchisor.

*(c) Policies Available for Review.*

All insurance policies shall be available for review by Franchisor, and the Franchisee shall keep on file with Franchisor certificates of insurance.

*(d) Additional Insureds; Prior Notice of Policy Cancellation.*

All general liability insurance policies shall name Franchisor, its officers, boards, commissions, commissioners, agents, and employees as additional insureds and shall further provide that any cancellation or reduction in coverage shall not be effective unless thirty (30) days' prior written notice thereof has been given to Franchisor. The Franchisee shall not

cancel any required insurance policy without submission of proof that the Franchisee has obtained alternative insurance satisfactory to Franchisor which complies with this Agreement.

(e) *Failure Constitutes Material Violation.*

Failure to comply with the insurance requirements set forth in this Section shall constitute a material violation of a Franchise.

(f) *Indemnification.*<sup>57</sup>

(1) The Franchisee shall, at its sole cost and expense, indemnify, hold harmless, and defend Franchisor, its officials, boards, commissions, commissioners, agents, and employees, against any and all claims, suits, causes of action, proceedings, and judgments for damages or equitable relief arising out of the construction, maintenance, or operation of its ATMS System; the conduct of the Franchisee's business in Franchisor; or in any way arising out of the Franchisee's enjoyment or exercise of a Franchise granted hereunder, regardless of whether the act or omission complained of is authorized, allowed, or prohibited by this Franchise Agreement.

(2) Specifically, the Franchisee shall, at its sole cost and expense, fully indemnify, defend, and hold harmless Franchisor, and in its capacity as such, the officers, agents, and employees thereof, from and against any and all claims,

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<sup>5-i</sup> ***It may be desirable for Franchisor to indemnify the Franchisee against certain types of liability. If so, the terms of that indemnification should be inserted here or in a separate section immediately following.***

suits, actions, liability, and judgments for damages or otherwise arising out of or alleged to arise out of the installation, construction, operation, or maintenance of its System.

(3) The indemnity provision includes, but is not limited to, Franchisor's reasonable attorneys' fees incurred in defending against any such claim, suit, or proceeding.

*(g) No Limit of Liability.*<sup>58</sup>

Neither the provisions of this Section nor any damages recovered by Franchisor shall be construed to limit the liability of the Franchisee for damages under any Franchise issued hereunder.

## **9. Performance Guarantees and Remedies**

(a) *Performance Bond.*

(1) Prior to any ATMS System construction, upgrade, or other work in the Public Rights of Way, the Franchisee shall establish in Franchisor's favor a performance bond in an amount specified in the Franchise Agreement or other authorization as necessary to ensure the Franchisee's faithful performance of the construction, upgrade, or other work. The amount of such performance bond shall be equal to ten (10) percent of the total cost of the work.

(2) In the event the Franchisee subject to such a performance bond fails to complete the ATMS System construction, upgrade, or other work in the Public Rights of Way in a safe,

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<sup>58</sup> ***This section may need to be revised if the Franchisor is to indemnify the Franchisee in certain cases.***

timely, and competent manner in accord with the provisions of a Franchise Agreement, there shall be recoverable, jointly and severally from the principal and surety of the bond, any damages or loss suffered by Franchisor as a result, including the full amount of any compensation, indemnification, or cost of removal or abandonment of any property of the Franchisee, or the cost of completing or repairing the System construction, upgrade, or other work in the Public Rights-of-Way, plus a reasonable allowance for attorneys' fees, up to the full amount of the bond.

(3) Upon completion of the System construction, upgrade, or other work in the Public Rights-of-Way and payment of all construction obligations of the ATMS System to the satisfaction of Franchisor, Franchisor shall eliminate the bond or reduce its amount after a time appropriate to determine whether the work performed was satisfactory, which time shall be established considering the nature of the work performed. Franchisor may subsequently require a new bond or an increase in the bond amount for any subsequent construction, upgrade, or other work in the Public Rights-of-Way. In any event, the total amount of the bond shall equal ten (10) percent of the cost of the work.

(4) The performance bond shall be issued by a surety with an A-1 or better rating of insurance in Best's Key Rating Guide, Property/Casualty Edition; shall be subject to the approval of Franchisor; and shall contain the following endorsement:

"This bond may not be canceled, or allowed to lapse, until sixty (60) days after receipt by Franchikor, by certified mail, return receipt requested, of a written notice from the issuer of the bond of intent to cancel or not to renew."

(b) *Failure Constitutes Material Violation.*

Failure to maintain the performance bond shall constitute a material violation of a Franchise.

(c) *Remedies."*

In addition to any other remedies available at law or equity, Franchisor may apply any one or a combination of the following remedies in the event the Franchisee violates this Franchise Agreement, or applicable state or federal law:

(1) Revoke the Franchise or shorten the term pursuant to the procedures specified in this Agreement.

(2) Impose penalties available under applicable state and local laws.

(3) In addition to or instead of any other remedy, seek legal or equitable relief from any court of competent jurisdiction.

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<sup>59</sup> *In addition to the remedies listed in this section, it may be desirable to provide for intermediate sanctions for violations of the Franchise that do not warrant revocation or litigation. The Franchise could provide for the establishment of a Security Fund, for example, and permit the Franchisor to withdraw certain amounts as liquidated damages in cases of minor breaches by the Franchisee that do not indicate an inability to perform the obligation agreed to in the document.*

(d) *Shortening, Revocation, or Termination of Franchise.*

(1) Franchisor shall have the right to shorten the term of a Franchise to a term not less than thirty-one (31) months from the date of the action shortening the Franchise term, or to revoke the Franchise, for the Franchisee's failure to construct, operate, or maintain the ATMS System as required by this Franchise Agreement, including failure to deliver a Construction Plan that meets the Franchisor's stated requirement for an ATMS System capable of accommodating the present and reasonably foreseeable future traffic management needs of the Franchisor; for defrauding or attempting to defraud Franchisor or Subscribers; if the Franchisee is declared bankrupt; or for any other material breach of the Franchise Agreement. To invoke the provisions of this Section, Franchisor shall give the Franchisee written notice of the default in its performance. If within thirty (30) calendar days following such written notice from Franchisor to the Franchisee, the Franchisee has not taken corrective action or corrective action is not being actively and expeditiously pursued to the satisfaction of Franchisor, Franchisor may give written notice to the Franchisee of its intent to shorten the term of or revoke the Franchise, stating its reasons; provided that no opportunity to cure shall be provided where the Franchisee has defrauded or attempted to defraud Franchisor or its Subscribers, or in the event the Franchisee is declared bankrupt. In the case of a fraud or attempted fraud, the Franchise may be revoked after the hearing

required under Section 9(d) (2); revocation for bankruptcy shall be governed by paragraph Section 9(d) (3).

(2) Prior to shortening the term of or revoking a Franchise, Franchisor shall hold a public hearing, on thirty (30) calendar days' notice, at which time the Franchisee and the public shall be given an opportunity to be heard. Following the public hearing, Franchisor may determine whether to shorten the Franchise term or to revoke the Franchise based on the information presented at the hearing, and other information of record. If Franchisor determines to shorten the Franchise term or revoke the Franchise, it shall issue a written decision setting forth the reasons for its decision. A copy of such decision shall be transmitted to the Franchisee.

(3) The Franchise may, at the option of Franchisor following a public hearing, be revoked one hundred twenty (120) calendar days after an assignment for the benefit of creditors or the appointment of a receiver or trustee to take over the business of the Franchisee, whether in a receivership, reorganization, bankruptcy assignment for the benefit of creditors, or other action or proceeding, unless within that one hundred twenty (120) day period:

(A) Such assignment, receivership, or trusteeship has been vacated; or

(B) Such assignee, receiver, or trustee has fully complied with the terms and conditions of this Franchise Agreement and has executed an agreement, approved by a court of

competent jurisdiction, assuming and agreeing to be bound by the terms and conditions of this Franchise Agreement acceptable to Franchisor, and such other conditions as may be established or as are required under Section 11 of this Agreement.

(C) In the event of foreclosure or other judicial sale of any of the facilities, equipment, or property of the Franchisee, Franchisor may revoke the Franchise, following a public hearing before Franchisor, by serving notice on the Franchisee and the successful bidder, in which event the Franchise and all rights and privileges of the Franchise will be revoked and will terminate thirty (30) calendar days after serving such notice, unless:

(i) Franchisor has approved the Transfer of the Franchise to the successful bidder; and

(ii) The successful bidder has covenanted and agreed with Franchisor to assume and be bound by the terms and conditions of this Franchise Agreement.

(4) If Franchisor revokes the Franchise, or if for any other reason the Franchisee abandons, terminates, or fails to operate or maintain the ATMS System or provide service as required by the Agreement, the following procedures and rights are effective:

(A) Franchisor may require the former Franchisee to remove its facilities and equipment at the former Franchisee's expense. If the former Franchisee fails to do so within a

reasonable period of time, Franchisor may have the removal done at the former Franchisee's and/or surety's expense.

(B) In the event of revocation, Franchisor, by resolution, may acquire ownership of the ATMS System at its then-fair market value, deducting therefrom the cost or damages to Franchisor resulting from Franchisee's default.

(C) If the ATMS System is abandoned by the Franchisee or the Franchisee fails to operate or maintain service or otherwise terminates the Franchise, the ownership of all portions of the ATMS System in Public Rights-of-Way shall revert to Franchisor and Franchisor may sell, assign, or Transfer all or part of the assets of the System.

(5) Franchisor may, by resolution, acquire ownership of and operate the ATMS System, whether or not such ownership is acquired following revocation or forfeiture of the Franchise.

(e) *Remedies Cumulative.*

All remedies under this Franchise Agreement are cumulative unless otherwise expressly stated. The exercise of one remedy shall not foreclose use of another, nor shall the exercise of a remedy or the payment of liquidated damages or penalties relieve the Franchisee of its obligations hereunder. Remedies may be used singly or in combination; in addition, Franchisor may exercise any rights it has at law or equity.

(f) *Relation to Insurance and Indemnity Requirements.*

Recovery by Franchisor of any amounts under insurance, the performance bond, or otherwise does not limit the Franchisee's

duty to indemnify Franchisor in any way; nor shall such recovery relieve the Franchisee of its obligations under a Franchise, limit the amounts owed to Franchisor, or in any respect prevent Franchisor from exercising any other right or remedy it may have.

## **10. Applications for Renewal or Modification of Franchises**

### *(a) Written Application.*

(1) A written application shall be filed with Franchisor for renewal of a Franchise or modification of this Franchise Agreement. An applicant shall demonstrate in its application compliance with all requirements of all applicable laws.

(2) To be acceptable for filing, a signed original of the application shall be submitted together with twelve (12) copies. The application must be accompanied by the required application filing fee as set forth in Section 11(d) and contain all required information. All applications shall include the names and addresses of Persons authorized to act on behalf of the applicant with respect to the application.

(3) All applications accepted for filing shall be made available by Franchisor for public inspection.

### *(b) Application for Renewal of a Franchise.*

(1) The Franchisee may seek renewal of the Franchise by submitting an application notifying Franchisor of its desire to renew the Franchise, and stating the terms on which it purposes to renew the Franchise. Such application shall be submitted no more than thirty-six (36) months prior to franchise

expiration and no less than twenty-four (24) months prior to franchise expiration. Franchisor may also seek renewal by requesting the Franchisee to submit an application; Franchisor may or may not include a statement of the terms on which it proposes to renew the Franchise with its request for a proposal.

(2) In considering an application for renewal, Franchisor shall consider the following factors:<sup>60</sup>

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<sup>60</sup> *This section protects the Franchisee's interests as well as the Franchisor's by establishing factors to be applied by the Franchisor in considering a renewal application. The government must thus justify its decision based on these factors, and cannot arbitrarily reject the Franchisee's proposal,*

*On the other hand, the model does not grant the Franchisee an automatic right of renewal for several reasons, First, the model presumes that the Franchisee will be adequately compensated for its investment over the term of the franchise. Indeed, in some modules, the private sector will have contributed very little capital to the project. Even when the private sector has contributed all the funding, if the Franchisee has received a fair return over the term of the franchise it may be fair to transfer title to the entire system to the government at the end of the term. Consequently, a renewal term is not always an economic necessity. Second, the unproven nature of the technology makes it very hard to predict what the needs of the Franchisor and the capabilities of the industry will be at the end of the term. Radical changes may be necessary in the System, in which case the government might be better off seeking proposals from a number of companies, including the Franchisor. Third, the Franchisor should have the ability to seek a new partner if the Franchisee provides inadequate service over the term of the franchise.*

*In practice, the renewal provisions will depend on the anticipated economics of the project and will be a subject of negotiation. For example, a franchisee may be given an automatic right of renewal under certain circumstances, but the government may retain the right to grant additional franchises at that point. Or, as noted above, there may be no renewal right at all and the government may simply take the system over at the end of the term. Many permutations are possible.*

(A) The extent to which the Franchisee has substantially complied with the applicable law and the material terms of the existing Franchise.

(B) Whether the quality of the Franchisee's service under the existing Franchise has been reasonable in light of the needs and interests of Franchisor and the public.

(C) Whether the Franchisee has the financial, technical, and legal qualifications to provide ATMS Service.

(D) Whether the application contains a proposal that is reasonable to meet the future traffic management needs and interests of the community.

(E) Whether the applicant proposes to provide adequate facilities or financial support during the renewal term.

(F) Whether renewal of the Franchise is warranted in the public interest considering the immediate and future effect on the Public Rights-of-Way and private property that would be used by the ATMS System, including the extent to which installation or maintenance as planned would require replacement of property or involve disruption of property, public services, or use of the Public Rights-of-Way.

(G) Whether another applicant for an ATMS franchise proposes to build a system that will meet community needs and interests and the other requirements established by Franchisor more effectively than the Franchisee's renewal proposal.

(3) The Franchisee shall submit with its application, or upon the request of Franchisor, such information as is required for Franchisor to assess the application in light of the foregoing factors.

(4) If Franchisor finds that it is in the public interest to renew the Franchise considering the factors set forth above, and subject to the Franchisee's entry into an appropriate Franchise Agreement, it shall renew the Franchise. If Franchisor denies renewal, it will issue a written decision explaining why renewal was denied. Prior to deciding whether or not to renew a Franchise, Franchisor may hold one or more public hearings or implement other procedures under which comments from the public on an application may be received. Franchisor also may grant or deny a request for renewal based on its review of an application without further proceedings.

*(c) Application for Modification of a Franchise.*

An application for modification of this Agreement shall include, at minimum, the following information:

- (1) The specific modification requested;
- (2) The justification for the requested modification;
- (4) Any other information that the Franchisee believes is necessary for Franchisor to make an informed determination on the application for modification; and
- (5) An affidavit or declaration of the franchisee or authorized officer certifying the truth and accuracy of the information in the application, and certifying that the

application is consistent with all federal and state law requirements.

(d) *Filing Fees.*

To be acceptable for filing, an application shall be accompanied by a filing fee in the following amount to cover costs incidental to the awarding or enforcement of the Franchise, as appropriate:

- |  |          |
|--|----------|
| (1) For renewal of a Franchise:                | \$60,000 |
| (2) For modification of a Franchise Agreement: | \$30,000 |
| (3) For approval of a Transfer:                | \$60,000 |

In addition, Franchisor may require the Franchisee, or, where applicable, a transferor or transferee, to reimburse Franchisor for its reasonable out-of-pocket expenses in considering the application, including consultants' fees.

(e) *Public Hearings.*

An applicant shall be notified of any public hearings held in connection with the evaluation of its application and shall be given an opportunity to be heard.

**11. Transfers**

(a) *City Approval Required.*

No Transfer shall occur without prior written notice to and approval of the Governing Body, and only then upon such terms and conditions as Franchisor deems necessary and proper. The Franchisee's obligations under this franchise involve personal services whose performance involves personal credit, trust, and confidence in the Franchisee, and transfer without the prior

written approval of Franchisor shall be considered to impair Franchisor's assurance of due performance. The granting of approval for a Transfer in one instance shall not render unnecessary approval of any subsequent Transfer.

(b) *Application.*

(1) The Franchisee shall promptly notify Franchisor of any proposed transfer. If any transfer should take place without prior notice to Franchisor, the Franchisee will promptly notify Franchisor that such a transfer has occurred.

(2) At least 120 calendar days prior to the contemplated effective date of a transfer, the Franchisee shall submit to Franchisor an application for approval of the transfer. Such an application shall provide complete information on the proposed transaction, including details on the legal, financial, technical, and other qualifications of the transferee, and on the potential impact of the Transfer on rates and service. At a minimum, the following information must be included in the application:

(A) all information and forms required under federal law;

(B) all information required in Section 10(b) of this Agreement;

(C) a detailed statement of the corporate or other business entity organization of the proposed transferee, together with an explanation of how decisions regarding the System will be made if the proposed transaction is approved;

(D) any business relationships or transactions of any kind, past, present, or anticipated, between the Franchisee, or its owners, subsidiaries, or affiliates, and any potential transferees, or their corporate parents, subsidiaries, or affiliates, other than the proposed transaction;

(E) any contracts, financing documents, or other documents that relate to the proposed transaction, and all documents, schedules, exhibits, or the like referred to therein;

(F) any documents related to the transaction (including any documents regarding rates the transferee expects to charge) that have been provided to any entity that has been asked to provide financing (debt, equity, or any other kind) for, or to underwrite any offering made in connection with, the proposed transaction;

(G) any documents provided to the Boards of Directors, Executive Committees, or similar controlling bodies of the Franchisee and any potential transferee, or their corporate parents, subsidiaries, or affiliates, regarding the proposed transaction;

(H) any shareholder reports or filings with the Securities and Exchange Commission ("SEC") or the Federal Trade Commission ("FTC") that discuss the transaction, and any filings required under the Clayton Act in connection with the proposed transaction;

(I) complete financial statements for the Franchisee and any potential transferees for the last three

years, including balance sheets, income statements, profit and loss statements, and documents detailing capital investments and operating costs;

(J) a detailed description of the sources and amounts of the funds to be used in the proposed transaction, indicating how the debt-equity ratio of the System will change in the course of the transaction; what entities will be liable for repayment of any debt incurred; what interest, payment schedule, and other terms or conditions will apply to any debt financing; any debt coverages or financial ratios any potential transferees will be required to maintain over the franchise term if the proposed transaction is approved; what financial resources would be available to the System under the control of the proposed transferee; whether the proposed transferee can meet debt-equity or any other required ratios without increasing rates, with any assumptions underlying that conclusion, and if not, what increases would be required and why;

(K) any other information necessary to provide a complete and accurate understanding of the financial position of the System before and after the proposed transfer, including but not limited to two sets of projected income statements and cash flow statements, including capital investments, for at least five years after the proposed transfer, one set assuming the transfer is approved, and one set assuming the transfer is not approved, each set stating specifically what assumptions are being made with respect to any rebuild or upgrade of the system;

(L) complete information regarding any potential impact of the transfer on Franchisee's rates and service;

(M) a detailed analysis of franchise fee payments made by the Franchisee, or any affiliate, during the life of the Franchise, showing (1) total gross revenues, by category (e.g., basic, pay, pay-per-view, advertising, installation, equipment, late charges, miscellaneous, other); (2) what revenues, by category, were included in the calculation of the franchise fee, so that it is clear what, if any, revenues were not included and the dollar value of those exclusions; (3) the value of any non-cash compensation received (e.g., trades for advertising spots), showing what amounts of non-cash compensation were included in the franchise fee calculation; (4) what, if any, deductions were made from revenues in calculating the franchise fee (e.g., bad debt), and the amount of each deduction; (5) if an outside agency was used to collect revenue (e.g., a collection agency, an advertising agency paid on the basis of percentage of sales), how much revenue was received by these agencies, and the total amount of revenues included for purposes of the franchise fee calculation;

(N) information sufficient to permit Franchisor to determine the Franchisee's compliance with its franchise obligations over the term of the Franchise, including specific descriptions of any noncompliance of which the Franchisee or any potential transferee is aware;

(O) any representations made to anyone, in connection with the transaction, about the Franchisee's compliance with its Franchise; and

(P) a brief summary of the proposed transferee's plans for at least the next five years regarding plant and equipment upgrades, expansion or elimination of services, and any other changes affecting or enhancing the performance of the System.

(3) For the purposes of determining whether it shall consent to a transfer, Franchisor or its agents may inquire into all qualifications of the prospective transferee and such other matters as Franchisor may deem necessary to determine whether the transfer is in the public interest and should be approved, denied, or conditioned. The Franchisee and any prospective transferees shall assist Franchisor in any such inquiry, and if they fail to do so, the request for transfer may be denied.

(c) *Determination by City.*

(1) In making a determination as to whether to grant, deny, or grant subject to conditions an application for a Transfer of a Franchise, Franchisor shall consider the legal, financial, and technical qualifications of the transferee to operate the System; any potential impact of the Transfer on Franchisee's rates or services; whether the incumbent Franchisee is in compliance with this Agreement, and, if not, the proposed transferee's commitment to cure such noncompliance; whether the transferee owns or controls any other ATMS System in Franchisor,

and whether operation by the transferee may eliminate or reduce competition in the delivery of ATMS Service in Franchisor; and whether operation by the transferee or approval of the Transfer would adversely affect Franchisor's interest under this Agreement, applicable law, or the public interest, or make it less likely that the future needs and interests of the community would be satisfied at a reasonable cost.

(2) Any transfer without Franchisor's prior written approval shall be ineffective, and shall make this franchise subject to cancellation at Franchisor's sole discretion, and to any other remedies available under the franchise or other applicable law.

(3) Franchisor reserves the right to review, inter alia, the purchase price of any Transfer or assignment of an ATMS System, and to take any necessary steps to ensure that any negotiated sale value which Franchisor deems unreasonable will not adversely affect system services or rates, including denial of the Transfer.

(4) Any mortgage, pledge or lease shall be subject and subordinate to the rights of Franchisor under this Ordinance or other applicable law.

(d) *Transferee's Agreement.*

No application for a Transfer of the Franchise shall be granted unless the transferee agrees in writing that it will abide by and accept all terms of this Agreement, and that it will assume the obligations, liabilities, and responsibility for all

acts and omissions, known and unknown, of the previous Franchisee under this Franchise Agreement for all purposes, including renewal, unless Franchisor, in its sole discretion, expressly waives this requirement in whole or in part.

*(e) Approval Does Not Constitute Waiver.*

Approval by Franchisor of a Transfer of the Franchise does not constitute a waiver or release of any of the rights of Franchisor under this Franchise Agreement, whether arising before or after the date of the Transfer.

*(f) Processing Fee.*

As a condition of considering a Transfer, Franchisor may require that the transferor or the transferee pay Franchisor's out-of-pocket expenses and a reasonable fee, as specified in Section 11(d), in considering the application for Transfer of the Franchise.

## **12. Miscellaneous Provisions**

*(a) Compliance With Laws.*

The Franchisee shall comply with all federal and state laws, as well as City ordinances, resolutions, rules and regulations heretofore and hereafter adopted or established during the entire term of its Franchise.

*(b) Captions.*

The captions to sections throughout this Agreement are intended solely to facilitate reading and reference to the sections and provisions of this Agreement. Such captions shall not affect the meaning or interpretation of this Agreement.

*(c) No Recourse Against Franchisor.*

Without limiting such immunities as Franchisor or other Persons may have under applicable law, the Franchisee shall have no recourse whatsoever against Franchisor or its officials, boards, commissions, agents or employees for any loss, costs, expense or damage arising out of any provision or requirement of this Agreement or because of the enforcement of this Agreement or Franchisor's exercise of its authority pursuant to this Agreement, or applicable law, unless the same shall be caused by criminal acts or by willful or gross negligence.

*(d) Rights and Remedies.*

(1) The rights and remedies reserved to the parties by this Agreement are cumulative and shall be in addition to and not in derogation on of any other rights and remedies which the parties may have with respect to the subject matter of this Agreement.

(2) Franchisor hereby reserves to itself the right to intervene in any suit, action or proceeding involving any provision of this Agreement.

(3) Specific mention of the materiality of any of the provisions herein is not intended to be exclusive of any others for the purpose of determining whether any failure of compliance hereunder is material and substantial.

(4) The Franchisee shall not be relieved of its obligation to comply with any of the provisions of this Agreement by reason of any failure of Franchisor to enforce prompt

compliance. Nor shall any inaction by Franchisor be deemed to waive a provision voiding any provision of this Agreement.

*(e) No Accord or Satisfaction.*

No acceptance of any payment by Franchisor shall be construed as a release or an accord and satisfaction of any claim Franchisor may have for further or additional sums payable under this Agreement or for the performance of any other obligation of the Franchisee.

*(f) Equal Employment Opportunity.*

The Franchisee shall not refuse to employ, discharge from employment, or discriminate against any Person in compensation or in terms, conditions, or privileges of employment because of race, color, religion, national origin, sex, or age. The Franchisee shall comply with all federal, state, and local laws and regulations governing equal employment opportunities, as the same may be from time to time amended.

*(g) Force Majeure.*

The Franchisee shall not be deemed in default with provisions of its Franchise where performance was rendered impossible by war or riots, civil disturbances, floods, or other natural catastrophes beyond the Franchisee's control, and a Franchise shall not be revoked or the Franchisee penalized for such noncompliance, provided that the Franchisee takes immediate and diligent steps to bring itself back into compliance and to comply as soon as possible under the circumstances with its Franchise without unduly endangering the health, safety, and

integrity of the Franchisee's employees or property, or the health, safety, and integrity of the public, Public Rights-of-Way, public property, or private property.

(h) *Calculation of Time.*

Unless otherwise indicated, when the performance or doing of any act, duty, matter, or payment is required under this Franchise Agreement, and a period of time or duration for the fulfillment of doing thereof is prescribed and is fixed herein, the time shall be computed so as to exclude the first and include the last day of the prescribed or fixed period of duration time.

(i) *Severability.*

If any term, condition, or provision of this Agreement shall, to any extent, be held to be invalid or unenforceable, the remainder hereof shall be valid in all other respects and continue to be effective. In the event of a subsequent change in applicable law so that the provision which had been held invalid is no longer invalid, said provision shall thereupon return to full force and effect without further action by Franchisor and shall thereafter be binding on the Franchisee and Franchisor.

AGREED TO THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 1994.

[INSERT NAME OF FRANCHISOR]

By: \_\_\_\_\_

ATTEST:

\_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_

[INSERT NAME OF OPERATOR],  
a [state] [corporation/partnership]

By: \_\_\_\_\_  
[title]

## EXHIBIT A -- FORM OF CONSTRUCTION PLAN

The final form of the Franchise Agreement will include a detailed form of a Construction Plan specifying those matters to be addressed by the plan. In preparing the exhibit, the parties will have ample opportunity to reach an understanding of what procedures are to be followed and what standards are to be met.

Among the issues that should be addressed in the Construction Plan are:

For those modules where there will be no or insufficient revenues to provide a natural incentive to minimize lifecycle costs and to expeditiously design and build the facility, the Franchisor should consider a variety of strategies to ensure lifecycle costs are minimized and construction is completed quickly. Among these provisions might be a requirement to perform lifecycle cost analysis of design, construction, maintenance and operations alternatives, a value engineering requirement, and incentive clauses and penalties to encourage rapid construction to encourage minimization of lifecycle costs including road user costs.

The construction plan should also require that appropriate consideration is given to lifecycle costs including transportation user costs, quality low cost materials, automated diagnostics, self-servicing procedures, automatic electronic paging of service personnel upon breakdown of any part of the System, modular equipment for easy repair and replacement of components, etc.

If the Construction Plan is to include the design function, it should address matters such as redundancy and reliability standards, including provision for multiple or back-up control centers and optical fiber rings.

The system should also be designed and built to foster the most cost effective maintenance over the lifecycle, and the system design should ensure that low cost maintenance procedures consistent with high quality and reliability standards will be possible once the system has been built.

## EXHIBIT B -- FORM OF ANNUAL, OPERATIONS PLAN

As described above regarding the Construction Plan, the parties will reach a general agreement on what matters are to be addressed in the operations plan before entering into the Franchise Agreement. Operations and maintenance procedures and standards will thus be agreed upon based on the specific requirements of a Franchisor and the nature of the system.

Among the issues to be considered are the need for maintenance procedures that preserve to the greatest degree practical the initial and any subsequent investments in the system, and the need for procedures consistent with high quality and reliability, as discussed above in Exhibit A. The Operation Plan and the Construction Plan must jointly ensure the following:

- o That appropriate consideration is given to lifecycle costs including transportation user costs, quality low cost materials, automated diagnostics, self-servicing procedures, automatic electronic paging of service personnel upon breakdown of any part of the System, modular equipment for easy repair and replacement of components, etc.
- o Establishment of a maintenance management system for purposes of managing the maintenance of the System.
- o Assurances that personnel with appropriate education training and experience to carry out the maintenance will be provided.
- o Assurance of the necessary acquisition and dedication of funds, labor, equipment and material to carry out the maintenance identified in the maintenance management system.

If Electronic Toll Collection is to be part of the System, the Operations Plan will need to consider the following issues:

- o Financial accounting and money management for tolls collected.
- o Stringent privacy protection.
- o Coordination with state, regional and local travel demand management programs.
- o Conformity with national equipment standards.

Finally, the Operations Plan will need to address how and to what degree the parties will share information needed to ensure the continuing operations of the system. For example, the

Franchisee may retain in its possession certain information required to run the system, such as software source code. It may be desirable to place such items in escrow, so that they will still be available in the event of a dispute between the parties. Such provisions may also be placed in the franchise itself. The issues may need to be addressed on a case-by-case basis and specific provisions drafted as required.

EXHIBIT C -- FORM OF ANNUAL OPERATIONS BUDGET

EXHIBIT D -- SCHEDULE OF ADDITIONAL EQUIPMENT

EXHIBIT E -- SCHEDULE OF UNIT FEES